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STATE IMPLEMENTATION OF FEDERAL STANDARDS

HEARING
BEFORE THE
SUBCOMMITTEE ON
INTERGOVERNMENTAL RELATIONS
OF THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
FIRST SESSION

PART 1

THE CLEAN AIR ACT

JULY 22, 1981

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(II)

CONTENTS

	Page
Opening statements:	
Senator Durenberger.....	1
Senator Sasser.....	60

WITNESSES

WEDNESDAY, JULY 22, 1981

Melvin J. Dubnick, associate professor of political science, University of Kansas; and Alan R. Gitelson, associate professor of political science, Loyola University of Chicago.....	3
David Walker, Assistant Director, Advisory Commission on Intergovernmental Relations.....	11
Anthony Cortese, commissioner, environmental quality engineering, State of Massachusetts; and Daniel J. Goodwin, manager of air pollution control, State of Illinois.....	20
Walter Rockenstein, member of city council, Minneapolis, Minn.; Robert T. Offutt, secretary-treasurer, air pollution control, district of Jefferson County, Ky.; and J. Wayne Cropp, director, air pollution control bureau, Chattanooga-Hamilton County, Tenn.....	60

ALPHABETICAL LIST OF WITNESSES

Cortese, Anthony:	
Testimony.....	20
Prepared statement.....	29
Cropp, J. Wayne:	
Testimony.....	60
Attachment to testimony.....	90
Dubnick, Melvin J.: Testimony.....	3
Gitelson, Alan R.: Testimony.....	3
Goodwin, Daniel J.:	
Testimony.....	20
Prepared statement with attachments.....	36
Offutt, Robert T.:	
Testimony.....	60
Prepared statement.....	81
Rockenstein, Walter:	
Testimony.....	60
Prepared statement.....	72
Walker, David: Testimony.....	11

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

A paper entitled "Nationalizing Regulation: Four Intergovernmental Mechanisms," by Melvin J. Dubnick, associate professor, Department of Political Science, University of Kansas, and Alan R. Gitelson, associate professor, Department of Political Science, Loyola University of Chicago.....	109
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STATE IMPLEMENTATION OF FEDERAL STANDARDS

WEDNESDAY, JULY 22, 1981

U.S. SENATE,
SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, D.C.

The subcommittee met at 2:15 p.m., in room 3302, Dirksen Senate Office Building, Hon. Dave Durenberger (chairman of the subcommittee) presiding.

Present: Senators Durenberger and Danforth.

OPENING STATEMENT OF SENATOR DURENBERGER

Senator DURENBERGER. The hearing will come to order.

This afternoon we begin the first in a series of hearings on an intergovernmental process that we shall call, for want of a better phrase, State implementation. For several years now there has been a great deal of concern in the intergovernmental community about the intrusion of the Federal Government into the traditional and constitutional prerogatives of State and local governments. Most of this concern has focused on "mandates" and "crosscutting requirements."

A "mandate" is a specific condition attached to a specific Federal grant-in-aid program. The illustration I think of most often is the right-turn-on-red law which we lived through here in the District of Columbia. In the early 1970's, when we first faced the energy crisis, the Congress created a grant program for State governments who do conservation planning. One requirement on any government that wanted to receive this program's benefits was that it consider several different conservation options and implement at least three options from the list. One of the three had to be right-turn-on-red.

This is perhaps not a dramatic example of Federal coercion, but it does clearly indicate the way that Congress has affected traffic control in cities and States all across the Nation. There are, by one count, 1,260 mandates like this in the Federal laws that authorize grants-in-aid.

A second form of intrusiveness is the "crosscutting requirement." It stipulates that any and all recipients of any and all Federal assistance will observe certain basic policy decisions of the Congress.

We explored one such crosscutting requirement in a recent hearing on the merit standards included in the Intergovernmental Personnel Act. Other examples include the Davis-Bacon Act, the National Environmental Policy Act, title VI of the Civil Rights Act, and section 504 of the Rehabilitation Act. The best count we have of crosscutting requirements is 59.

Today we want to take up Federal intrusiveness in a third form: "State implementation." We have in mind those programs like the Clean Air Act where a Federal agency creates certain standards and either requires or provides an option for State and local governments to implement a plan—or achieve the standards—through regulations promulgated according to State laws and procedures.

This form of intergovernmental relations has received very little attention by scholars and interest groups. Perhaps the neglect is explained by the fact that regulatory programs taking this form are rather new on the intergovernmental scene. Perhaps it is because the grants-in-aid system—with its \$90 billion in expenditures, 1,260 mandates and 59 crosscutting requirements—has been so large as to eclipse from view any other intergovernmental issue.

We don't intend to allow this pattern of neglect to continue. We intend to examine the Clean Air Act, OSHA, the Federal Water Pollution Control Act, the Surface Mining Reclamation Act, the Emergency Energy Conservation Act and other programs authorized by the Congress that take this form. In a series of hearings we will try to determine what lessons are to be learned from a decade of "State implementation" of important Federal policies.

The reason for beginning with the Clean Air Act is obvious to anyone who has been following the press reports on the administration's reauthorization review of this law. It has often been reported that some in the administration are proposing that we abolish the Federal role in setting standards and that we return to the 1960's when the Federal role was largely one of technical assistance. Such suggestions raise one of the fundamental issues we intend to examine in these hearings: "Why is the Federal Government setting the standards?"

In the case of the Clean Air Act, there are at least two answers that might serve as a theoretical justification for "State implementation." The first, and in the case of the Clean Air Act most important, is that the Federal role is designed to regulate competition among the States that, if left unregulated, would lead to outcomes which all of us would choose to avoid. The right to dirty the air in the process of manufacturing, mining, refining, and otherwise producing goods and services has important implications for the ultimate cost of the goods and services. An unregulated industry that does not have to internalize these costs would have a significant competitive advantage over others that do.

It is easy to see that 50 States competing for jobs and industry might use the level of clean air standards as devices to affect the location decisions of business and industry. This really is environment versus jobs competition, and it is not necessary. Federal standard setting in the area of air pollution allows us to arrive at an outcome that we would all prefer—clean air—without a locational bias for one State or region over another. At least that should be one of the goals of the Clean Air Act.

This law provides a second illustration of the Federal purpose in setting standards. The Federal Government sets the emission levels for new mobile sources—cars and trucks. It would have been possible to leave this matter up to the individual States and their SIPs, but that would most likely have led to 50 different standards—not for

reasons of interstate competition but for other more technical and diverse reasons.

Our national automobile manufacturers quite understandably find such an outcome unworkable. So the Federal Government has again preempted a State prerogative with respect to air pollution regulation. In this series of hearings we want to examine other instances where the requirements of an open interstate market in commerce require this form of Federal preemption.

I hope these comments give our witnesses and guests an idea of where we start this new journey in intergovernmental relations. It is a relatively uncharted area and the value of this oversight work has yet to be determined. We rely on your assistance to inform and enlighten us.

We will be hearing today from State and local officials who have worked within this regulatory system and from scholars who have pondered the implications of a variety of Federal regulatory systems involving State and local governments. Unfortunately, we don't have anyone here from Idaho because I didn't see the story until this morning. However, we do have with us Dr. Alan Gitelson of Loyola University of Chicago and Dr. Melvin Dubnick of Kansas University and a variety of other people who will be introduced during the course of the afternoon.

If I may start with the two gentlemen whom I have already introduced, at least by way of their association, both of them are professors of political science. When I said there was little scholarly work done, I wanted to except these two gentlemen from that. We welcome both of you here today. Unless you have arranged otherwise, Dr. Gitelson, you may go first.

TESTIMONY OF MELVIN J. DUBNICK, ASSOCIATE PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF KANSAS; AND ALAN R. GITELSON, ASSOCIATE PROFESSOR OF POLITICAL SCIENCE, LOYOLA UNIVERSITY OF CHICAGO

Mr. GITELSON. Dr. Dubnick will read our statement. Then we will both respond to questions.

Senator DURENBERGER. All right.

Mr. DUBNICK. Mr. Chairman, I am Melvin Dubnick. On behalf of myself and my colleague, Dr. Gitelson, I want to thank you for the opportunity to testify on this subject. Our testimony is based on the research Dr. Gitelson and I have been conducting on intergovernmental relations. The work we will summarize in this brief statement takes up over 30 single-spaced pages. Therefore, what we present here is merely an overview of that work. We hope you and others in the room will have an opportunity to read the more detailed presentation.¹

Intergovernmental relationships have emerged and evolved slowly over the past two centuries. It is only through hindsight that we can see the forms and directions Federal relations have taken. As two analysts of intergovernmental relations, we have focused our attention on recent developments in a variety of regulatory policy arenas. We found

¹ See p. 109.

not only a significant shift in the use of intergovernmental relations, but also a strong indication that the very nature of those relationships is undergoing a potentially radical change.

Through most of the 20th century, intergovernmental relations were primarily a means of aiding or enhancing the policy capacities of State and local governments. Grants were provided as a way of transferring funds to desirable policy areas—such as highway and hospital construction, higher education, public health, and other programs. Often conditions were attached, but these typically required administrative or procedural changes—such as the consolidation of similar programs under a single agency, or the development of a civil service system for program personnel. The common theme of these efforts reflected the attitude among national officials that such conditions would help improve State and local government administration in areas where subnational units were the principal policymakers.

It is difficult to pinpoint the moment when the dominant attitude changed. It is clear that sometime during the mid-1960's there was a fundamental shift in perspective. Subnational units began to be regarded as potential "delivery mechanisms" for Federal policy in a number of areas. The intergovernmental relations system was perceived as a "tool box" from which various implements could be drawn in the National Government's efforts to carry out its policies. This development coincided with and complemented both Washington's increasing role in social and environmental policy arenas and its growing reliance on regulatory approaches to public problems.

The means for converting State and local units into delivery mechanisms for national regulatory policies varied from program to program. However, our analysis indicates that four basic forms of intergovernmental relations were used to achieve that end. Two are rooted in the more traditional types of intergovernmental relations: technical assistance and financial aid.

The transformation of these policy tools from means intended to facilitate the traditional tasks of subnational entities to techniques used to recruit State and local officials into the service of national policy implementors was simply a matter of turning "carrots" into "sticks;" or, to use another metaphor, "making them an offer they couldn't refuse." In fact, some of these offers of assistance and aid are structured in such a way that it would be administratively, fiscally, and politically impossible for subnational officials to reject them.

Thus, what often seems voluntary on the surface may actually involve a great deal of coercion and compulsion. For many States in the Midwest and West, the 55-mile-per-hour speed limit exemplifies this approach. However, other examples could be cited.

While we would not wish to understate the role of technical and financial assistance in this new system of intergovernmental relations, it must be noted that the other two means for making State and local officials part of a national policy delivery system may prove both more significant and controversial in the long run. We have called the first of these approaches the "assertion of preemptive capabilities"—or "partial preemption"—and the second "legal conscription."

Under "partial preemption," Congress asserts its exclusive jurisdiction of a given policy area and usually makes an explicit statement

prohibiting unsanctioned State or local activity in the field. Having formally occupied the field, the national policy extends an open invitation for subnational entities to participate in the program if they meet certain substantive, administrative, and procedural conditions. Typically these include mandating that State policies in the area be at least as stringent as Federal policies, and that an acceptable implementation plan be drawn up and approved by the appropriate Federal officials.

In exchange for that participation, State and local officials receive technical and fiscal assistance for both setting up and operating their program agencies. They retain operational jurisdiction over that policy area. Here the archetypical examples are found in the areas of occupational safety and health, pesticide regulation, and policies related to strip mining.

The final approach is, by far, the most revolutionary of the means for obtaining State and local government cooperation in implementing national policies. It minimizes both the voluntary nature of subnational unit participation and the substantive discretion provided for the State and local officials who are involved. In fact, this mechanism challenges the very essence of Federalism as a system of separate legal jurisdictions. It relies upon a unitary vision involving hierarchically related central and periphery units. It goes beyond preemption. Focusing attention on the national scope of a public problem, this approach assumes that policy solutions should determine the relationships between various levels of government.

The logic of this approach allows national officials to mobilize State and local resources on behalf of national policy programs as they see fit. These resources can be mobilized in various ways, but underlying each step in the process is the ability of national officials to formally and legally "draft" those resources into national service. Thus we call this "legal conscription."

The 1970 Clean Air Act Amendments provided the first major instances of this approach. These were followed by similar provisions in the 1972 Federal Water Pollution Control Act Amendments. The legal conscription approach is also evident in the 1978 National Energy Policy Act, particularly in portions of the National Energy Conservation Policy Act and in the Public Utilities Regulatory Policy Act. The specific citations to relevant provisions are provided in our study.

It should be stressed here, however, that while legal conscription mechanisms are "on the books," they have seen rather limited use. For various political, administrative, and economic reasons, national officials have been reluctant to assert the powers provided to them under this approach. Therefore, not only have State and local officials, thus far, been spared the "rod" that is implied in legal conscription, but there also has not been a major test of the constitutionality of the approach.

As noted in our paper, however, legal conscription is still a potentially powerful tool for national officials to use. For the moment, at least, it remains only a "high explosive" in the arsenal of intergovernmental mechanisms that can be used to nationalize regulatory policies.

These changes and developments have a number of implications. Legally and constitutionally, they represent a new challenge to the

tradition of Federalism—a challenge that the Federal concept may not be able to meet. Politically, they provide both costs and opportunities for State and local officials who must contend with this new set of intergovernmental relations. As another scholar in this area has noted, perhaps the most significant cost involved is the possible loss of legitimacy and authority that State and local units will suffer.

Fiscally, budgetary and related policy distortions which were characteristic of the growing categorical grant system of the 1960's and 1970's are likely to be magnified as financially strapped State and local officials undertake the burden of implementing Federal policies.

Administratively, there is little evidence that anything will be gained from these changes. Using the intergovernmental system to deliver national regulatory policies may, in fact, prove self-defeating. We know very little about that system. Our indiscriminate reliance on it is bound to prove frustrating unless we learn more about it and those who are involved in its operations.

Thank you.

Senator DURENBERGER. Thank you both very much.

I have had an opportunity to look at your longer statement, with its numerous attachments, which was delivered at the 1980 annual meeting of the Political Science Association. You have provided—both in this statement and in your testimony today—a very thoughtful description and analysis of the trends toward developing national policy and using a regulatory approach to achieve national goals.

At the present time, however—I just came from a meeting with representatives to the national meeting of the Urban Coalition—we at the Federal Government level are busy cutting, capping, and blocking funds for grants-in-aid, cutting back numerous regulations, and doing a variety of other things. Clearly this is part of our effort to give more careful consideration to what we should and should not be doing.

In this climate of redefining the Federal role, could you expand a little bit on your statement? Under what circumstances is it appropriate for the Federal Government to regulate through the intergovernmental system? Maybe this comes sort of like some little set of criteria, or definitions or whatever?

Mr. GITELSON. Senator, the topic of intergovernmental regulations is a very difficult one to define or discuss in the abstract. In our initial research we have found that under certain circumstances it may be very appropriate to use the intergovernmental mechanism. Under other circumstances it may be less appropriate.

Senator DURENBERGER. Any specific clues, or anything that sort of stands out, as to where it is most appropriate to look at the intergovernmental aspect?

Mr. GITELSON. We can distinguish between two issues in intergovernmental relations: political and technical. I will briefly speak to the political question. Mel might want to discuss the question of technical attributes.

Politically we know that intergovernmental relations represents a rather complex issue: one that is difficult to summarize in a brief period of time. We know, for example, that there are many political questions involved in any intergovernmental program—particularly when

it involves Federal regulations. Local communities desire to subsidize certain programs through an intergovernmental program; yet, at the same time, that desire is tempered once that Federal program has been canceled and the municipality must maintain its own financing for the program. The problems that a local government gets into are enormous, particularly political and fiscal problems.

Mayor Koch, of New York, recently wrote an article outlining the difficulties that occur for a municipality that is initially happy to get involved in regulated intergovernmental programs which provide Federal aid; but then tremendous burdens, fiscal and otherwise, exist for the city once that aid has been cut. Intergovernmental regulations often require financial commitments that State and local governments are often pressed to meet.

Politically, a local unit will, at times, have to choose between funding a necessary local project not funded by the Federal Government and one partially funded by the Federal Government. The strong temptation is for the local unit to get as much outside fiscal aid as possible. The matching of that aid with local funds is often at the cost of financing local programs which will not attract outside aid. This is not to argue, obviously, against Federal aid on a variety of problems, but simply to suggest that the Federal Government, through its regulatory programs and via preemption and legal conscription, can strongly influence local spending patterns. On the question of technical differences, we can suggest a number of things.

Mr. DUBNICK. Right. We have been looking at various alternatives to intergovernmental relations as a delivery mechanism. We are finding that it really is not a matter of alternatives to it but different variations of using intergovernmental systems.

We have been finding, for instance, that there are certain areas where there is a high degree of consensus, at least among those involved, about the desirability for regulation and for a high degree of technical expertise in the area where everyone is pretty certain about cause-effect relationships between regulating and the result.

An interesting but mundane example is weights and measures, which is constitutionally a function of the National Government. It is one of the ancient regulatory systems of the Federal Government. It is so successful that few really realize that there is regulation going on. If you look into the weights and measures system which the National Bureau of Standards heads, what you find is an intergovernmental system—a very highly developed intergovernmental system. It is based not only on legal legitimacy where local enforcers of weights and measures believe that the Federal Government has a right to set standards, but also on a strong technical legitimacy—an expertise basis for the legitimacy. So the National Bureau of Standards probably doesn't even look at itself as a regulatory agency, and it is extremely successful in that regard.

There are also areas where there is a low degree of consensus and a high degree of certainty, such as the 55-mile-per-hour speed limit, for which the intergovernmental system has been designed differently in order to deliver the regulation.

Senator DUKENBERGER. Can you also share with us some clues on where it is most appropriate to use what you call assertion of preemptive capabilities versus your prescriptive legal conscription example? You were describing the system, I know, as it exists now.

Mr. DUBNICK. Right.

Senator DURENBERGER. I am going beyond that and saying, are there some specific clues as to whether one or the other approach might be most appropriate?

Mr. DUBNICK. I think one way in which it has been used, which is probably beneficial to the system, is in the area of environmental protection—not necessarily with the Clean Air Act—by getting States to start their own programs. This is done by the Federal Government preempting the system and then turning around and making it very desirable for States to adopt their own programs which are efficient and effective. That may be the best place for it.

What happens, however, or what seems to happen, is that it doesn't stop there. Once the States do have a program in place, as I think we will hear in later testimony, they generally find that the Federal Government doesn't stop imposing new requirements and new standards. It continually tries to make the State be sure it is being honest, or at least living up to the standards which the Federal Government is continually placing on it.

Senator DURENBERGER. Where do we justify preemption? If you can recall, in my opening statement I talked about interstate competition to attract business and the impact of this on interstate commerce. We also have such things as interstate transportation. I am trying to see if you can give us some guidance on what principles, in your mind, might justify preemption by the National Government.

Mr. DUBNICK. It is difficult to come up with a specific answer. Each area really has its own unique history and its own unique circumstances. Again, how the system is designed to handle that would depend on those circumstances.

Senator DURENBERGER. Also in my opening remarks I made a distinction between mandates, crosscutting requirements, and State implementation—which around here is a very familiar typology. Could you relate your own typology to the one I have used? In your view, is the National Environmental Policy Act, which is a cross-cutting requirement, really very different from the Clean Air Act where we are requiring State implementation as a form of inter-governmental relations? Don't they both sort of come out about the same way, whether you use the crosscutting requirement of NEPA or the State implementation which is inherent in the Clean Air Act? Aren't they about the same thing?

Mr. GITELSON. I think we can suggest that there are similarities. One of the points we wanted to suggest within the context of our paper, particularly at the close of it—and this may be somewhat off your question, but it is relevant to the general issue—is that the Clean Air Act and other acts in some ways encompass all of the characteristics of our particular model.

We are suggesting that within those characteristics we can see signs of technical assistance and fiscal assistance in terms of grants-in-aid. Under certain circumstances we see what we call partial preemption and legal conscription. To talk strictly in terms of our model of the Clean Air Act as being simply one of exemplifying legal conscription is misleading. Developmentally and within the context of the way policies are carried out, the Clean Air Act really cuts across a variety of different models in terms of best describing how it func-

tions, how it mandates State policy, what its impact or effect is on State acts regarding environmental protection, and a variety of other areas.

Mr. DUBNICK. If I could just add something. There is something we tried to stress in our statement and I want to stress it again. There is a process cost and an authority cost to the choice of mechanism which is used. Yes, I think there is a relationship between the way NEPA affects State and local governments and the effects of other kinds of acts in the way in which they get State and local governments to do things. Trying to compare them on the basis of their ultimate effects, I think, is losing sight of the fact that there is a process effect which goes on.

The State and local governments which voluntarily do something in light of technical or financial assistance, with no strings attached, are probably not going to suffer the costs in legitimacy and authority that they would suffer, let's say, if they were sued in order to carry out certain action. So the end result may be the same; but the process cost—the authority cost, as Professor Hanus of American University puts it—can be significant.

I think that cost oftentimes is ignored when we indiscriminately just say let the State and local governments do it and it is well for them to do it. There has to be some consideration of those differences.

Senator DURENBERGER. In your view, is the legal conscription approach to clean air necessary to achieve State and local participation in the pollution control effort?

Mr. GITELSON. Again I think we have to suggest that under some circumstances it is appropriate and under other circumstances less appropriate. We obviously need more research in this field.

Legal conscription is a useful mechanism and has been a useful mechanism in any one of a number of States. We feel that it probably has to be somewhat modified. One has to take into account regional and statewide differences. There has to be some form of appeal system within these particular regions and/or States. For the most part the Clean Air Act—and I think the testimony from the witness from Minnesota will support this—has been very useful in the context of cleaning up a variety of pollution problems. But, on the other hand, there is still a need for more State input.

However, we are suggesting in our own research that local municipalities and States are not exactly handcuffed under these regulations. Under any one of a number of circumstances, local municipalities and State commissions can and do have different weapons or tools that they can use to delay or counter Federal regulations across a broad spectrum of issues.

For example, EPA regulations as well as regulations emanating from the National Historic Preservation Act of 1966 have been used by local communities to successfully delay or halt interstate highway programs mandated by the State and Federal governments. In this case, as in others, local communities have been able to use Federal regulations to counter other Federal regulations. Intentionally or unintentionally, we have built into the system tools for local and State governments to use against the Federal Government. Professor Dubnick and I would like to emphasize, however, the need for strong national direction and regulation, through an intergovernmental mechanism, in a variety of

areas including air and water pollution control where problems often cross over municipal and State boundaries and where State and local governments are reluctant to act for fiscal, technical or political reasons. We don't want to suggest that within the context of the legal conscription we have totally tied the hands of local municipalities.

Mr. DUBNICK. If I can carry the conscription label a little bit further, to the military conscription of a decade ago. The draft, in that sense, opened up all sorts of alternatives. Legal conscription, even though it has never been enforced, has been put there as a potential high explosive; it is there. I don't think it has been used. I can't find a case in which it has actually been used. It has not been tested in the courts. It may prove to be unconstitutional.

I think the fact that conscription is there and that there are alternatives where State and local governments, seeing that they will have to participate anyway, might as well take the grant money and do it, might as well take the opportunities offered by the legislation—the Clean Air Act and other laws—and work through those mechanisms rather than wait for EPA or another unit to force them to do something. In one act the Attorney General has the power to sue a State without getting any OK from anybody. Again, I cannot find an instance where it was used; but like the military draft, it is there. Knowing it is there will itself have an impact.

Senator DURENBERGER. One last question. I don't know much about the case, but I read in the Washington Post this morning about Idaho giving up EPA control. The thought occurred to me that, in the context of legal conscription, the case proves one of the shortcomings in the conscription sort of a situation. Unless the State, or the subnational unit—as you were calling it—has some particular self-interest involved, or has some substantial financial support from the Federal Government, it seems to be relatively easy for them to just avoid the draft and go to Canada—whatever the case may be—even though they are going to have to face some kind of legal sanction.

Mr. DUBNICK. That depends on the change in political environment. EPA may not want to take issue with Idaho's stance right now. Here is where the political factors have to be taken into account. Legal conscription is like having one alternative, and that is to shoot the person you are dealing with. There aren't any other alternatives to that tool that the Federal Government has at its disposal. That probably accounts for the fact that a lot of agencies which do have legal conscription capabilities are very reluctant to even think about it, let alone implement it.

Mr. GITELSON. I gathered from this morning's paper that EPA is moving slowly on this process. This does not mean EPA has ruled out more extensive action through the use of legal conscription. It does not suggest that it may not reach the point where EPA may take more fundamental action against Idaho. I think things will move slowly, but the potential is clearly there on the part of the Federal Government, to implement Federal EPA regulations. The Idaho case also reminds us, indirectly, that in our intergovernmental system, Federal and State laws and regulations can, and often do, conflict with one another. We must begin to study these conflicts and the means by which they can be resolved, for they often cause untold delays in the State implementation process.

Senator DURENBERGER. Thank you.

Senator Danforth?

Senator DANFORTH. No questions.

Senator DURENBERGER. Thank you both very much for your prepared statement, for your responses to the questions, and for your interest in this exotic subject.

Mr. GITELSON. Thank you.

Mr. DUBNICK. Thank you.

Senator DURENBERGER. Our next witness is Mr. David Walker. David is the Assistant Director of the Advisory Commission on Intergovernmental Relations, and a familiar face to this subcommittee.

TESTIMONY OF DAVID WALKER, ASSISTANT DIRECTOR, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

Mr. WALKER. Mr. Chairman, members of the subcommittee, let me begin by expressing my appreciation for being invited to testify today. Your topic, intergovernmental regulation, is one of extreme current interest to the ACIR. As you know, we are in the process of embarking on a study of our own in this very difficult area. Thus, while we are more than happy to be able to aid you in your investigation of it, we are, in turn, being aided by these hearings, especially with the testimony being given this afternoon.

In the initial phase of our study of intergovernmental regulation, we have identified, as you have, four fairly new techniques by which the Federal Government regulates the activities of State and local governments. Most of these techniques have emerged in full form over the past decade.

First, there are direct orders, usually judicial and usually grounded in the 14th amendment.

Second, there are crosscutting requirements, on which we have done some fairly extensive research. There are national policy requirements which adhere to the receipt of all or most grants-in-aid, whether or not the purpose of that aid is furthered thereby.

Third, there are crossover fiscal sanctions, which have emerged wholly in the seventies. That is, grant-related "threats" which jeopardize the funding of one or more other programs in the same functional area if the requirements of the principal program are not met. I might say the Clean Air Act of 1970 illustrates this as well as it does the partial preemption issue.

Finally, there is partial preemption, the technique exemplified by the program I have been asked to testify on today. Through the partial preemption technique, the Federal Government, after identifying a national problem, pinpoints a constitutional "hook" on which it can hang its right to control or regulate that problem. That hook can usually be found in the interstate commerce clause. Of course, regulating through the commerce clause is as old as the Constitution itself.

What makes the partial preemption approach new and different is that the Federal Government, in effect, forces the States to administer a national policy—an act, which under other circumstances, would probably constitute a violation of the 10th amendment—by asserting that if the States don't enforce certain standards, then the Federal Government will. The Clean Air Act of 1970 is probably the best example of partial preemption, although there are earlier case

studies—the Water Quality Control Act of 1965 and, of course, OSHA.

In March of 1981, the Commission, as part of its multivolume examination of the Federal role in the Federal system, published a case study of Federal involvement in environmental policy, concentrating on air and water pollution. I have a copy here, if you care to have it. I believe, however, that you already have copies of it.

Our study of Federal air pollution policy revealed a two-stage evolutionary process which took the Federal Government from a small research and grant program begun in 1955 to the massive effort we witness today.

Stage 1—lasting from 1955 until 1970 in the field of air pollution control and witnessing four significant changes in law—we have termed “policymaking by incremental adjustments,” which is, one might say, the traditional way in which we have done business in this country. Stage 1 exhibited a number of fairly constant growth characteristics. It featured a slow building process from one enactment to the next based on the then state of knowledge regarding the types and effects of pollutants. It featured a few fairly constant interest groups—conservationists, the old-style conservationists from today’s perspective, and the urban lobby in favor of greater Federal involvement with industry—primarily the auto industry—lobbying for more of a hands-off approach. It also featured the involvement of a few policy entrepreneurs, in particular, Senator Edmund S. Muskie.

In addition, Stage 1 featured two types of constraints which served to “rein in” expansive Federal involvement. The first was the basic unwillingness of the Eisenhower administration to make large spending commitments in the area. The second, which lasted until approximately 1965, was a strong States’ rights legal argument, espoused both by the States and by industry. It held that Federal enforcement would impair existing State programs and constitute an unwarranted intrusion into a traditionally State and local function. Such constraints would be politically overwhelmed in the second stage.

Stage 2—launched pretty much in 1970 and characteristic of many of the developments during this last decade—we have termed “speculative augmentation,” a term coined by Prof. Charles O. Jones of the University of Pittsburgh. According to Professor Jones:

The most striking feature of the policy action in 1970 was the escalation of proposals leading to the enactment of a law admittedly beyond the immediate capabilities to apply. . . . Normally decisionmakers are expected to refine existing policy by determining what is technically and administratively feasible, as well as what is within the limits of acceptability to those being regulated. In speculative augmentation, however, the basis of decisionmaking changes. Feasibility is less important than estimating what will be acceptable to a rather indistinct “public” perceived to be demanding stringent action. Since decisionmakers cannot be certain what will be acceptable, however, they are forced to speculate in designing satisfactory changes in the law, and whatever specific form these changes take, they must constitute more than a mere increment in existing law, regardless of administrative and technological capabilities. . . .

Whereas we normally think of formulation’s preceding majority-building in the policy process and identify each step with the executive and legislative, respectively, in 1970 a majority seemingly awaited unspecified strong action. Thus, instead of a majority having to be established for a policy, a policy had to be constructed for a majority. Much of that occurred within Congress as proposals escalated toward various actors’ perceptions of what was necessary to meet public demands.¹

¹ Charles O. Jones, *Clean Air* (Pittsburgh, Pa.: The University of Pittsburgh Press, 1975), p. 176.

Unlike Stage 1 then, the Stage 2 environmental policymaking process involved more than a few congressional entrepreneurs and supportive interests. As the scope of public interest in pollution control expanded—and quite dramatically—the number of actors directly involved in the process also expanded. In addition, policymakers began reacting not only to their own perceptions of public demands but to the proposals of other policymakers as well. Thus, environmental policy came to be what was essentially a game of one-upmanship.

Senator Muskie was once again the pivotal figure. In order to retain his position as chief environmental policymaker, he, more than anyone, was forced to react to each new actor who entered the process. He watched his proposed National Air Quality Standards Act—a series of incremental, some might say traditional, adjustments to the Air Quality Act of 1967—eclipsed by a stronger Presidential proposal, a much more expansive House bill, the Gaylord Nelson-sponsored Earth Day, as well as Senator Jackson's leadership in the enactment of the National Environmental Policy Act, and, finally, what was almost certainly an overly critical Ralph Nader report. Senator Muskie was literally forced to come up with something "bigger and better" or relinquish his leadership role. The Senator's choice was reflected in the Clean Air Act of 1970, a rather radical departure from previous environmental legislation.

The interest group focus also changed during Stage 2, taking its cues from the new environmental groups. First, a concerted effort was made to influence public opinion. This was certainly clear in the case of Earth Day, a "national event" coordinated by the group which later became known as Environmental Action. Second, a number of the newer groups in the postlegislative process chose the courts as the preferred arena in which to wage their environmental struggle. They were facilitated in their efforts by broad court interpretations of standing to sue. Finally, some of the newer groups chose not to attract membership. Instead, their resources were spent on lobbying Congress and acting as a public information source. Significantly, this information often included the environmental voting records of Members of Congress.

That policymaking during Stage 1 proceeded incrementally was due, in large measure, to the real and perceived constraints which served to delimit the Federal role. In other words, significant political and legal constraints existed to curb Federal action. These constraints on Federal expansion included budgetary concerns, a powerful and effective industrial lobby which lasted through the sixties, and a reticence to usurp a traditional State function, which really lasted through the late sixties.

By 1969, the environmental policy process and, consequently, the scope of the Federal role, were beginning to change dramatically. Suddenly there seemed to be no constraints on what the Federal Government could or should do to save the environment. Thus, the following factors served to overwhelm many of the older constraints which usually are apparent throughout the national policymaking process. These include:

Broad-based public demands, which, as expressed in demonstrations as well as in public opinion polls, not only were the most important

contributing factors but served also as catalysts for the remaining factors;

Reticence on the part of policymakers to claim budgetary or any other concerns as being more important than a clean environment;

A feeling on the part of many Federal policymakers that the States had had at least 20 years to act decisively and effectively with little or no result;

A combination of events and changing attitudes occurring throughout the 1960's, which made industry particularly vulnerable to attack;

An unwillingness to seriously study possible economic or social costs of pollution control;

A very genuine fear that cleaning the environment was, literally, a "now or never" proposition; and

The ambivalent twin beliefs that the very technology which had been labeled as the polluting enemy could, if properly directed, continue to maintain the same basic American lifestyle under conditions of clean air, water, and land.

Having briefly described the actors and the rather unique atmosphere which led to the creation of the Clean Air Act, we come at last to the one factor which, at least in theory and rhetoric, remained constant throughout both Stage 1 and Stage 2. This factor assured use of the partial preemption technique as opposed to full Federal preemption in the field of pollution control. That factor is best described by quoting a portion of title I of the Clean Air Act itself:

(3) That the prevention and control of air pollution at its source is the primary responsibility of States and local governments.

That was the fundamental implementation point stressed throughout the two stages.

Thus, amid all the radical changes which produced the toughest pollution law to that date, the tradition of State and local primacy in pollution control remained intact, at least on the surface. Yet, as in all partial preemptions, it was primacy with a twist—primacy based, for all practical purposes, on implementing Federal policy.

In closing, I doubt that anyone would deny the need for a national policy of air pollution control. What is less certain, what demands careful study, is the technique of partial preemption used for implementing that policy. We hope that through the work of this subcommittee, as well as our own study of this topic and other unique means by which the Federal Government mandates State and local activities, we can then begin sorting out the proper from the improper, the efficient from the inefficient, in this large and pretty uncertain area of intergovernmental relations.

Senator DURENBERGER. Thank you.

I want to start by having you draw a distinction between your definition of "partial preemption" and the previous witnesses' definitions of "assertion of preemptive capabilities" and "legal conscription," as you understand them.

Mr. WALKER. I think I understand the distinction that the gentlemen made. As I view this problem, it is the way in which the partial preemption departs from what might be called the traditional cooperative Federal approach in the area of regulation and/or grant administration.

In effect, a State is in a position of accepting the role of implementing the national policy or not. If it doesn't do it, the Federal Government can move in. If it does do it, then a portion of the State bureaucracy, in effect, becomes an adjunct of the National Government. That is where the traditional aspects of what the role of a State would be dramatically shifted.

In such a situation, the traditional approach would be—not only in an administrative but in a policy sense—their capacity to interrelate with Federal officials, so that what came out of it would bear the imprint of folk from both levels.

What we have here, in practice, is that there have been a few State-engineered modifications, with the utilization of a portion of State government, primarily for a national policy. If Prof. Lewis Kaden had been here this afternoon he would have dwelled heavily on the question which I tried to highlight here. Since I am not a lawyer, I leave it in the realm of posing the question of the propriety of having an integral element of State government required to pursue a policy which the National Government has the legal power to pursue on its own, vis-à-vis the private sector and/or the State. This is a synthetic variety of cooperative Federalism. This is a first-rate variety of cooperative Federalism. It raises a series of fundamental, political, legal, and administrative questions—all of which the courts, to date, largely have ignored.

Senator DURENBERGER. We have talked about clean air. Has ACIR identified other Federal laws or programs that fall under your label of partial preemption?

Mr. WALKER. Yes, sir. The Water Quality Control Act of 1965, for example, and there are others which illustrate this that we can provide the subcommittee. The clearest and most dramatic example, however, is the one the subcommittee is looked at, Senator.

Senator DURENBERGER. Given what I hear to be your comments on the strong Federal role and the relatively weak State role in air pollution and some other areas—and your political and historical backgrounding on these—do you foresee, as of now, similar circumstances leading to the use of this approach in other policy areas?

Mr. WALKER. You are asking me to read the current political climate of the Congress. I would say, at the moment, that the kinds of reauthorizations which might emerge—the proposed modifications that one reads about—and the administration's deregulation efforts all suggest a more cautious approach to extending this device to other fields.

I would say that there is a vast change from 1970. I am guessing here. I would sense there may be some modifications in this approach, and less of a tendency to rely on part of it, more of a questioning perhaps of its real implications than was done in the past.

Senator DURENBERGER. I did not want to be making a political scientist or a lawyer out of you.

Mr. WALKER. I am a generalist.

Senator DURENBERGER. Let me ask you the question differently. Under what conditions would you feel it is necessary to use the preemptive regulatory approach in order to achieve national objectives? Also, under what conditions is it desirable, as perhaps opposed to necessary, to use them?

Mr. WALKER. I think a rather literal reading of article I, section 8 of the Constitution would help spell out the role of the National Government, once you have decided that a public policy is involved. The issue of spillovers—externalities, the actual nature of air sheds—to me, indicates a prime Federal role in this area.

The question then remains, how does one implement national policy? The approach to date in this area has been one of partial preemption. I speak now personally, not from the Commission's viewpoint. One could posit the idea that if one is serious about decongesting the system, one may reach the point where it isn't only the 580-odd grants-in-aid programs but also the array—and we do not have a number at this point—of intergovernmental regulations that make for the system's congested condition, then the appropriateness of the devices used becomes a key question.

In the grant area, the Commission has urged that income maintenance is a proper responsibility of the Federal Government. One might argue in the regulatory realm of certain fundamental aspects of achieving clean air are a prime, direct responsibility of the National Government. This leaves administrative units of the State governments intact pursuing primarily State or shared policy directives rather than solely national policy directives. One could argue that way, but I am really raising this as a personal view.

As it is now, as the previous witnesses indicated, there is a heavy element of conscription. Moreover, this gets rather confused because each of the partial exemption examples I cited have a small—usually small—grants-in-aid program associated with it. The relationship then looks a bit like an extension of the old-style grants-in-aid approach of doing business. In effect, however, it is a fist; and the carrot dimension of the relationship is pretty meager—not much of an incentive really. Witness Idaho.

So I raise the question of the rather sincere effort on the part of some of the authors of the 1970 legislation to keep within the rhetoric at least of cooperative Federalism with the partial preemption approach as preferable to direct Federal performance of the regulatory function.

In this regulatory area, as in the grants-in-aid area, we have struggled manfully to keep the Federal Government's bureaucracy small. Hence, we've constrained, severely constrained, the direct Federal approach. This then is no more than another example of our 50-year habit of relying on the State governments to do a job that, in many instances, the Federal Government ought to be doing directly.

Senator DURENBERGER. Let me ask you one more question on the State implementation plan. In the Clean Air Act it is a Federal regulation and is enforced by the Federal Government. Would you just comment on the SIP as a regulation? Is it necessary to go that route to make State officials carry out national goals?

Mr. WALKER. It is kind of a logical derivative of the partial preemption approach. The States draw it up. It is obviously heavily constrained by what the Feds have already required.

One related point I didn't make in response to an earlier question is that had the drafters of the measure really sincerely thought out the regulatory process, so that a measure of policy discretion was to be left to State people, then State implementation plans would be some-

thing which would reflect some sort of national minimum standards, but differentiated on a 50-State basis. The State governments would provide some independent decisionmaking and inputs, which hopefully reflect their own level of industrialization, urban densities, and so forth. There are basic differentiating factors that relate to air quality standards which presumably would be reflected in the way in which the EPA and those drafting the SIP would collaborate.

Senator DURENBERGER. Senator Danforth?

Senator DANFORTH. Dr. Walker, from listening to your testimony, I believe you think that the basic test which Congress applies to the question, "What is the appropriate State role versus the appropriate Federal role in environmental policy," is: When you are rated by the environmental groups, will you appear to be an environmentalist or not?

The first time this issue occurred to me, if I may relate some history, was when the strip mine reclamation bill was on the floor of the Senate. Before coming to the Senate, I had been the attorney general of my State. I had played a role in drafting our State's strip mine reclamation law and I was quite proud of it. So, when this issue came to the Senate I thought, "Well, is there anything left for my State to do? Is there any role for it to play? Is there any reasonable role that it should play?"

In thinking about these questions, it occurred to me that perhaps a reasonable basis for deciding what the Federal Government and what the State government should do would be that, on matters such as water quality and water pollution, the standards should be Federal; because, theoretically at least, if a drop of polluted liquid is dropped anywhere, it flows to the Ocean. Similarly, any kind of general environmental problem, theoretically at least, could be Federal. But on matters pertaining to the appearance of land and the use of land—that is, the restoration of it to appear and to look in a certain way—it seems to me, could be left to the States.

So, naively, I offered a couple of floor amendments to that effect. I think I got 37 votes for one amendment and 38 votes for the second amendment. One of my colleagues who was voting with me said, "Well, this will ruin my environmental standing in the ratings."

Another example of this problem is the transportation of hazardous material. It is my understanding that in the transportation of hazardous material communities are increasingly getting into the act of regulating the transportation of hazardous materials.

Mr. WALKER. Right.

Senator DANFORTH. This material, I assume, has to be transported. As a result, it is oftentimes transported through interstate commerce. But if you have each community regulating when it can go through that community, it rapidly becomes a political football within that community. The local city council is going to adopt the toughest possible standards. As a result, the hazardous material is not going to be transported.

Mr. WALKER. Right.

Senator DANFORTH. It is just going to be a fiasco. So, in my mind, there has to be some way of sorting out those kinds of issues which should be Federal. I would say that transportation is normally Federal. But it becomes an immediate political problem for people who advocate that position.

For example, people say there should be standard lengths of trucks because the alternative presents a ridiculous situation. You can't have a truck reach the border of one State and then have to accommodate different restrictions imposed by that State. That would seem to me to be clearly a burden on interstate commerce.

On the other hand, matters that are purely local, such as the appearance or the use of real estate, it seems to me, are historically and should remain local or State by nature.

I don't know how we are going to ever sort these concerns out. I don't think we can leave it to the courts, because I think—it has been a while since I have read many cases dealing with the application of the commerce clause—but I think courts are fairly willing to find at least some relationship between a statute and the commerce clause.

Mr. WALKER. I agree.

Senator DANFORTH. So maybe the Congress, instead of dealing with everything on just an ad hoc basis or being pushed by some lobby which threatens to give a bad rating, should adopt some crosscutting, if you will, formulas of our own—formulas which would create rules of thumb and make determinations on what sorts of issues we believe are Federal and what sorts of issues we believe are State.

Maybe that is futile, but I think that if we don't do that, then really the argument immediately becomes, "Don't you care about the environment;" or, "Don't you care about this, that, or the other thing?"

I mean the emotion-packed, good versus evil, rhetoric on the floor of the Senate just is a knockout punch for a politician. So maybe the way to approach this business is not to just look at one particular sector of Federal regulation and then another, but to do the kind of thing that Senator Durenberger is doing now. Maybe we should do it in some legislative form of just saying, "Here is a new look at the kinds of things the Federal Government should do; and here are the kinds of things that the Federal Government should not do."

I don't know what "partial preemption" means. However, I do know this: From the standpoint of somebody in State government, it doesn't make very much difference if the Federal Government does something itself; or if, on the other hand, it turns the State and local governments into administrative arms of the Federal Government by saying, "Do it our way or you don't get the money." In fact, Federal influence can be more manipulative by using a more subtle version of its authority.

I mean, when the Federal Government starts saying "Here is this huge program, and you don't get any of it if you don't do some little thing our way," it is a small tail sometimes wagging a very large dog. It can be more manipulative, not less manipulative. I think it is a terribly important subject.

You know, we rush to deal with all of the specific issues which are very important—with the water, the air. My gosh, that is important. What our Founding Fathers started talking about and concentrating on were none of these specific matters. Instead they worked on the whole makeup of the government; how it was supposed to fit together; and how the local governments, the State governments, and the Federal Government were supposed to relate to each other. We don't think about that kind of thing around here. Senator Durenberger

does, but very few people do. We are so interested in putting out our press releases and getting those ratings. It is just a mad scramble to convince people that the Federal Government, or the people in the Congress, are going to do whatever it takes to get those ratings, whether it makes any sense or not.

I don't know. I have been rambling, but I think that is what you were talking about. I know it is a matter of great interest and concern. I am sorry there isn't a roomful of Senators here to participate in this discussion.

Mr. WALKER. All I can say, by way of comment, is that we did come out of that 11-volume Federal role study with a few hints—a few indices of those things the Federal Government ought to be involved with wholly, and also of those things the Federal Government ought not to be involved with at all. There was some fuzziness about those programs left over where there would be a continuing Federal, State, and local relationship. It is our hope that in the regulatory study we are doing now at least one group of recommendations would begin to address the concerns you have in this regulatory area.

There is some legal scholarship being brought to bear on this, but it hasn't been reflected in court decisions. These treatises, however, may be helpful to the subcommittee and to the ACIR. Hopefully, we will have a few guidelines before us when the study is finished in a year or so.

Senator DANFORTH. Can I ask you one other question? I didn't mean to interrupt.

Mr. WALKER. Yes; I have finished.

Senator DANFORTH. You point out in your statement Earth Day and all of the flamboyant ways of publicizing the environmental problem. As I said, at the time I was attorney general of Missouri, "My gosh, it deserves to be publicized." We drafted all of the environmental legislation for the legislature. We were up to our ears in it. We were keen believers in it.

But it seems to me that there should be some way—in an upbeat, positive way—of publicizing the other problems. That is, the whole question of where the decisions are supposed to be made in government; and the fact that, if there is absolutely no distinction, if it is just we do anything that seems sensible at the moment, we lose something which is very fundamental in this country.

I don't know if there is any way. I am sure that the 11-volume report is very helpful. It is obviously worth doing. Can you think of any way of beating the drums and having some kind of way to popularize this subject?

Mr. WALKER. I think the question of "Who is doing what" is being posed more frequently now than it was over the past 20 years. That is one way of getting the type of answers we are seeking—by simply posing that question: Who ought to be doing that?

I think more and more we have discovered that when you thrust not only an array of governmental services, but also presumed responsibilities in the regulatory area, to jurisdictions which in essence are independent sources of decisionmaking—at least under our constitutional format—you compound inordinately the accountability question. Theories of accountability—whether bureaucratic, electoral, or

fiscal—just get badly mauled and almost everybody at this point now understands that issue.

Senator DANFORTH. They understand it when they have funny things brought to their attention—you know, the garbage truck noise thing. People understand that. They get a good laugh at it. There is a way to publicize it in a kind of “golden fleece” way. But I don’t know. It just seems to me there is a limit to what you can do by poking fun at things.

Mr. WALKER. I think you’ve provided an eloquent second statement from the dias on why these hearings are very vital.

Senator DANFORTH. Yes.

Mr. WALKER. Very vital.

Senator DANFORTH. Thank you very much. I am sorry to go over my time, Mr. Chairman.

Senator DURENBERGER. Thank you, Dave. I thank you for invoking that response of my colleague from Missouri.

Mr. WALKER. Thank you.

Senator DURENBERGER. I just want you to know when you get away from the tax bill, when you get away from the office and you get down here where it is 66 degrees in the middle of the summer, you can think all kinds of great and good thoughts.

We are going to get a part of the answer to one of your questions, Jack. The next two witnesses are from the State level. They are Dan Goodwin and Tony Cortese, both of whom are involved in the Clean Air Act. Dan Goodwin is vice president of the State and Territorial Air Pollution Program Administrators [STAPPA], although he might have a comment in his capacity as air pollution control director of the State of Illinois as well. Mr. Cortese is representing the National Governors’ Association in his capacity as staff director of the Association’s Task Force on Regulatory Reform. He is also commissioner of the Massachusetts Department of Environmental Quality Engineering, with responsibility for the air pollution control program.

You might start in that order. Mr. Goodwin, do you want to summarize your statement first? Then we will ask you questions.

Mr. GOODWIN. I would like to suggest that Mr. Cortese go first, if I may, Senator.

Senator DURENBERGER. Fine.

TESTIMONY OF ANTHONY CORTESE, COMMISSIONER, ENVIRONMENTAL QUALITY ENGINEERING, STATE OF MASSACHUSETTS; AND DANIEL J. GOODWIN, MANAGER OF AIR POLLUTION CONTROL, STATE OF ILLINOIS

Mr. CORTESE. Thank you, Senator, for the opportunity to appear before you. I am not going to read my statement since I know you have had an opportunity to see it.

My name is Anthony Cortese. I am commissioner of the Massachusetts Department of Environmental Quality Engineering. I have spent a dozen years as both a State and Federal official in the environmental regulatory area.

Let me start by saying that I have had the unique opportunity to work with the National Governors’ Association for a long time. I have

to congratulate Governor Rockefeller and the NGA staff for putting a remarkable effort into trying to get consensus on how we should revise the Clean Air Act to make it stronger and, at the same time, streamline the administrative process. I have never seen the Governors come to such remarkable consensus. I think it is due, in part, to his leadership. It has been an extensive effort over the last 6 months.

When Congress passed the Clean Air Act of 1970, there was no question that we had a serious air pollution problem. Congress envisioned a strong Federal-State partnership to clean up the Nation's air. At that time, with a few exceptions, the State programs were not very strong. There needed to be a strong Federal push to get the programs moving to clean up the Nation's air.

We have made tremendous progress in a decade in two areas: One, in cleaning up the air; and, two, in boosting State programs. But we have not solved all of the problems. We still have millions of people in the United States breathing unhealthy air. This is largely due to automobile smog problems and the long-range transport of air pollution, including the phenomenon called acid rain. We need to continue to move forward in the area of air pollution control.

Despite some pretty good cooperation on the part of the Federal Government and the States, the Federal-State partnership has been less than ideal in the last decade in trying to implement the law. The current procedures for getting a permit to build a new source any place in the United States, and for either developing or revising implementation plans to achieve national air quality standards are duplicative. They cause long delays which raise cost of doing business in this country. It causes frustration among the public and industry, causing people to attack the substance of the Clean Air Act, and it is wasteful of State and Federal resources.

This has occurred because the Federal Government continues to regulate States today as if it were 1970, with the lowest common denominator approach—that is, assuming that all States are operating their programs as the worst State in the United States is. The Federal Government does not recognize, at this point, the difference in the willingness and the capability of various States to carry out the programs for air pollution control.

Due to a number of factors which you have heard earlier today—financial assistance, technical assistance, Federal regulation, Federal law, Federal preemption—the number of State officials involved in air quality programs has grown from 3,000 in 1970 to 9,000 today. The capability has increased. The States are now very sophisticated in their ability to carry out air quality programs. There is no reason to have the duplication of effort which we now experience. Let me give you an example.

In 1978, we decided to convert the largest oil-fired powerplant in the United States to coal, the Brayton Point powerplant in Massachusetts. We negotiated a conversion which would meet air quality standards, reduce sulfur oxide and particulate emissions, and save consumers over \$200 million a year. That conversion was delayed for 2 years because the Environmental Protection Agency duplicated my department's review of analyzing the technical basis for that coal conversion. It was totally unnecessary. As a result of that 2-year

delay, \$400 million was lost to the consumers of Massachusetts, and not one additional pound of pollution was reduced in the atmosphere.

What are our recommendations? We believe that there has to be a strong Federal role because of the interstate nature of air pollution. The Federal Government should continue to set air quality standards based on protecting people's health, set deadlines for the achievement of those standards, and establish generic State implementation plan requirements for States to design plans to meet those air quality standards. They should continue to provide Federal financial and technical assistance. But they should only step in and promulgate an implementation plan, withhold funds or impose sanctions where States are unwilling or incapable of doing so. In those cases they must step in; otherwise we will experience the problem which the chairman was talking about earlier today.

States should have the full responsibility to design and implement air quality plans. These plans should be designed to meet local conditions. Let me give you an example.

If we were to use the Federal guidelines to try to achieve reductions in hydrocarbon emissions from a number of industrial sources 2 years ago, we would have put several industries out of business and cost the remaining 30-some odd industries some \$14 million. We appealed to the Federal Government and asked for an opportunity to do source-by-source emission limitations which would be specific for Massachusetts. Under great duress, they allowed us to do that. We were able to reduce the cost from \$14 million to \$2 million and reduce the amount of hazardous waste which was generated in the State. We were still able to achieve our air quality standards on the same timetable.

It is that kind of flexibility that we believe the States should have. The Federal Government should not be second-guessing States on individual source requirements. They should be looking at generic plan requirements and stepping in where States do not do the job properly. They should use a post-audit procedure in evaluating State plan performance. They should use the hearings procedures that the States use in developing the State implementation plans. They should not go through a completely duplicative technical analysis, a whole set of public hearings, all over again in order to get the same kind of testimony which we have been able to obtain at the State level.

In the area of long distance transport, we think that this is one area where there is a significant issue with respect to interstate pollution. We believe that the law should reflect the strong Federal role to deal with interstate pollution. We believe that the Federal Government should designate corridors which include both source and receptive States. It should give the States time to try to come to agreement on how to reduce the emissions to reduce the problems of smog and acid rain. If after a reasonable period of time that problem is not solved, then the Federal Government should step in and establish requirements.

I guess, in summary, it is sort of like the Federal preemption process that has been talked about by the previous witnesses. We believe that this kind of Federal-State partnership which recognizes the ability and the willingness of States to carry out their programs, with the assistance and oversight of the Federal Government, without duplica-

tion and minimizing redtape, is the means by which we should try to implement the Clean Air Act.

Thank you.

Senator DURENBERGER. Thank you very much.

Mr. Goodwin?

Mr. GOODWIN. Thank you, Mr. Chairman. I appreciate the opportunity to share with you today my experiences, perceptions and recommendations concerning the roles and relationships of the Federal and State governments in the national air pollution control program established by the Clean Air Act.

Even though I am regarded by some as an outspoken critic of the Clean Air Act, I place myself among the most ardent defenders of its basic goals and concepts. The Nation must have a strong national program for dealing with air pollution, because no State, no matter how committed its citizens and government officials may be, can solve its air quality problems without Federal help. Air pollutants do not respect political boundaries and neither does the industrial redevelopment which is so vital to maintaining and restoring local economies in the most polluted areas of the country.

Unfortunately, in the last few years, Federal involvement in air pollution control has shifted from a secondary role of technical and financial assistance to the States and coordination of efforts to deal with transboundary problems. It has shifted to a situation where every minute detail of each State's program must be reviewed and approved by the U.S. Environmental Protection Agency. There is no longer even a pretense of focusing the Federal effort on those issues which are of true interstate or national significance.

The changes to the Clean Air Act advocated by STAPPA are mostly concerned with redirecting the focus of Federal efforts back to basic issues of national or interstate importance. It would allow the States greater flexibility to conduct their programs in accordance with their own perceptions of their needs and priorities in those matters which are of purely intrastate concern.

There is considerable consensus among a wide spectrum of interested groups that major changes are needed in the requirements for State implementation plans (SIP). The present system, everyone seems to agree, is inordinately cumbersome and involves the Federal Government in too much of the details of State programs. State officials contend that a shift to a generic rule concept as the key element of the SIP is the best way to correct this problem, with minor deviations from the generic rule approved by States without need for Federal concurrence.

In addition, the double-key procedure for sequential State and Federal adoption of SIP regulations must be streamlined. It takes too long and consumes too much money and effort. The State and Federal reviews should be telescoped into one joint process.

There needs to be a distinction added to the act between elements of SIP content which are intended to be regulatory and those which represent supporting information. Concepts of Federal review and enforcement are needed for some types of SIP elements which are different from those now being used. With these and other reforms discussed in my written statement, a much simpler and cleaner administrative framework will be provided.

There should also be a special status accorded State officials responsible for the SIP, such that the limitations of the Administrative Procedure Act on ex parte contact in Federal rulemaking can be eased for them. This would remove inhibitions to open communication on SIP-related problems and facilitate their resolution.

On the subject of sanctions against States for failure to meet SIP requirements, STAPPA believes that the construction moratorium has outlived its usefulness and should be eliminated. A credible threat of Federal promulgation of rules to correct major SIP deficiencies is the best incentive available to assure responsible action by the States.

In the area of enforcement, we believe that insufficient consultation with State officials by EPA has produced unnecessary Federal-State friction. This is only minimally the fault of the statute. Administrative changes are needed to allow the States to resume their lead role on enforcement matters.

Federal technical and financial assistance to the States to aid them in fulfilling their program responsibilities is vital. We understand that increases in Federal program grant funds for States, needed to offset inflation and the cost of carrying out increasing responsibilities in the Federal program, are unlikely. We accept that reality. We only ask that Congress help us glean the maximum amount of benefit possible from the available funds by allowing us more flexibility in use of those funds, and by eliminating the need to waste resources on unproductive paperwork and redtape. By increasing our efficiency and by devoting constant attention to priorities, we believe we can still maintain the forward momentum of the program.

Let me conclude by stating that State air quality officials believe a strong Federal program is essential. We oppose any moves to materially weaken the substantive provisions of the act. The changes we advocate are mostly procedural and are intended to facilitate State implementation of the national program, as originally envisioned by Congress.

State officials accept without hesitation the critical role Congress has asked us to play. Working together with our Federal and local partners in a streamlined administrative framework, we believe the vital national goal of clean, healthful air for all our citizens can be achieved.

Thank you.

Senator DURENBERGER. Let me ask you first about the State implementation plan as it applies to ambient air quality standards, the Clean Air Act implementation and so forth. I understood your testimony to be against the SIP as a Federal regulation. You see nothing wrong with our using the SIP as we do under OSHA, where a State's implementation plan is measured against a set of Federal standards and approved if it basically meets those standards. Is that kind of an approach impossible as applied to clean air?

Mr. CORTESE. No, not at all. In fact, that is what goes on now. I think our quarrel is with the degree of detail that the Federal Government requires for approval. They require approval over almost every little thing we do. Let me give you an example, to which I think Dan was referring.

Without respect to individual source permits, that is, requirements for individual sources, we feel that the Federal Government should

approve a generic regulation which regulates a category of sources and should not get involved with what we do with each individual source. As long as we come up with a plan to regulate all of the sources which will meet air quality standards within the State and not cause an interstate problem, then we think that the Federal Government should not be involved in those individual source decisions.

Mr. GOODWIN. I agree with that statement. It seems that the critical question that one encounters in this kind of discussion is "What does it take in order to assure Federal enforceability of all of the requirements which are necessary to assure that the ambient standards will be met?"

Senator DURENBERGER. Under the Clean Air Act, at least right now, it takes Federal adoption of the State plan.

Mr. GOODWIN. Federal rulemaking, correct. Although we have recently had a decision in the seventh appellate circuit which suggests maybe that theory is not necessarily the law of the land, as far as I know it is still the position of the Environmental Protection Agency.

Mr. CORTESE. Let me give you an example. In the normal SIP process, the States always cooperate very closely with the EPA. We tell them what we are doing before we go to public hearing and before we develop a regulation. They usually come and testify. They can't officially say whether they will approve it or not, but they will tell us whether or not they think it meets the requirements.

There is no reason why they can't use the State hearing process, the whole public participation effort, we use; take the testimony—we submit the entire testimony, all of our analysis and the regulations to them—and then just generically decide whether or not to approve or disapprove. We think that is definitely possible.

Senator DURENBERGER. I understand your response in terms of improving the process of matching the State's plan against standards. How about the importance of that plan then being published in the Federal Register and being, in effect, a Federal regulation? In your opinion, is that essential for the Federal clout side of this?

Mr. CORTESE. I think that is a Federal legal question. For example, we don't think that they have to propose approval, get more public comment, receive that public comment, and then publish a final approval. Why can't they just take the hearing record, the whole process that the State has taken, and then, in one fell swoop, say "yes" or "no" within a certain period of time? In fact, we think that there should be a time lapse, say 90 days, that if the Federal Government does not take action, it is automatically approved. We think you can do that by statute.

Senator DURENBERGER. One of you indicated that you thought some State and local governments would prefer Federal sanctions to compliance with the act. Did I read that in one of your statements?

Mr. GOODWIN. That was in my complete statement, yes. Well, there have been some States which have made that choice: Idaho, some areas of Kentucky, California, and Ohio. The sanctions appear, on their surface, to be worse than they really turn out to be sometimes. Once that is understood by the decisionmakers, they are sometimes of the opinion that the punishment is easier to take than the political heat which they expect to get for doing what is necessary to avoid the sanction.

Senator DURENBERGER. I am just reading this report I referred to earlier in the Washington Post about Idaho. Dick Theil, EPA's man in the Seattle regional office, states that he doesn't know much about what went on behind the scenes of this thing. He does say that, because Idaho's plan is technically not in compliance with the Clean Air Act and because it is due for revision, EPA can thus limit the growth of the smokestacks and other sources of pollution.

I am putting that in the context of a sanction. Are you aware of any of these kinds of sanctions being imposed on any noncomplying States or localities?

Mr. CORTESE. Yes.

Mr. GOODWIN. Yes, Senator, I have had that particular sanction in effect in Chicago since July 1, 1979, despite the fact that a State regulation—which in our opinion satisfied the requirement—has been awaiting final Federal approval since October of 1979. The sanction has been there over 1½ years, not because we haven't done our thing but because the EPA hasn't done its thing. Not only is that sanction not producing anything constructive, in terms of a solution to the problem—because we believe the solution is already in front of the Federal Government—but the people who are affected by the sanction have nothing to do with the issue which brought the sanction into play in the first place.

Senator DURENBERGER. Is it a containment issue or something?

Mr. GOODWIN. The issue concerns regulation of the steel industry. None of the steel companies in the Chicago area have any announced plans which would be constrained by this permit moratorium. However, other companies, that really aren't involved in the issue at all, have had to modify their plans, in some way, because of the inability to get the permit.

Senator DURENBERGER. I have heard from both of you, and of course know from my own experience in this area, about all of the nitpicky details, the attention to things that really aren't of national significance or international commerce on the part of EPA. I think I have also heard there is a very serious lack of communication within EPA, between headquarters and regional levels. And I have heard you testify to the fact that there is not much adequate two-way communication between EPA and State and local officials.

Is this just something that the new Director of EPA can remedy, or maybe the process of remedying it is just a matter of cleaning up the act, or does it need policy changes of some kind on our part?

Mr. CORTESE. Yes and no. Yes, I think most of those things can be handled by the administrator. But I think there are some things, which Dan mentioned, that are extremely important.

As was stated earlier, the primary role for carrying out the Clean Air Act is State and local government. We would like to participate as full partners with the Federal Government in the development of national policies, because national policies aren't just Federal policies. They are a combination of Federal, State, and local policies.

For over 10 years every general counsel in the EPA and in the Office of Management and Budget has indicated that the States are an interest group like any other interest group—like the industry, environmentalists or anybody else. Therefore, the States are subject to the Federal Advisory Committee Act and, therefore—

Senator DURENBERGER. You are different. You are tools of inter-governmental relations that we have laid out here earlier.

Mr. CORTESE. That is right. We feel very strongly that we should be able to participate in the development of new regulations and new policies. We are preempted from doing that because of the legal decisions which have been made pursuant to the Federal Advisory Committee Act. This act says that they have to give 30 days' notice in the Federal Register, an opportunity for all members of the public to input. We think we have a special status because we are the ones who are primarily responsible for carrying out the environmental laws.

Senator DURENBERGER. Do you have an analysis or a list of those opinions and their applicability which might be made available to this subcommittee?

Mr. CORTESE. We don't. We can make them available to you. In fact, the National Governors' Association is trying to write an advisory opinion for OMB to indicate that we think that opinion is incorrect. If that doesn't work, we might suggest that, under laws like the Federal Water Pollution Control Act and the Clean Air Act where the States have the primary responsibility, the Congress might consider giving us a special exemption. We really believe that we should be involved in trying to develop those policies right up front. If we were, I think you would see a tremendous improvement in the communication gap that has occurred between States and the Federal Government over the past decade.

Senator DURENBERGER. I now understand clearly why we talk about this as conscription rather than intergovernmental relations. I would personally appreciate very much your sharing more of that information with the staff of this subcommittee. It doesn't have to be made part of this record, but it would be very helpful to us.

Mr. CORTESE. Fine.

Senator DURENBERGER. I am going to ask one last question which deals, Tony, with your testimony relative to the interstate transport problems. You appropriately used, as an example, acid rain—which is a problem in my State—and smog, which is not. Then you talked about establishing corridors and things like that.

One way to read that is to give us a little time to do it, and if we don't—if it doesn't work out—then you can do something. Another way to read that is that you want us to go back to the sixties, which Dave Walker described here earlier—or Stage Three really—if States did fail to take effective action.

I am just wondering whether individual States have the capacity to deal with these interstate transport problems, or if we aren't on the threshold of needing some kind of a multi-State arrangement to deal with this. I am curious to know whether the Governors or the Association which you represent have dealt in a new way with this issue of interstate transport. Can we look for some other kinds of arrangements out there which will give us more hope than we would have if we just said that it sounds like sixties talk from the States?

Mr. CORTESE. We are not suggesting that it be back-to-the-sixties talk. What we are suggesting is maybe the law should recognize that there is a long-range transport problem. Maybe the law should specify

some date by which the States have to get together and come to a decision, the sanction being that if we don't do it by that particular date—and that is the stick. The stick is for the States to try to get together and solve that problem after the corridors have been designated.

The National Governors' Association has offered to sponsor those kinds of discussions among the States to try to solve those problems. That is what we are really talking about, not to leave it open ended. What we are suggesting is something other than just direct Federal regulation right now. We are suggesting that you put a date on it, with the sanctions being that the Federal Government will step in if, in fact, the States don't come to agreement.

With respect to sanctions, you raised the question earlier that States look at sanctions in many ways. Sometimes the States ignore the sanctions; sometimes they don't. What Dan was saying earlier is very important. Probably the biggest sanction against the State is for the Federal Government to step in and regulate. When the Federal Government steps in and regulates, our experience has been, over the past 10 years, that they are generally inflexible and they don't really tailor things to the local conditions. Our industry is not very happy with the fact that the Federal Government is regulating. That is a very important thing to us.

Now that the States have developed the capability that we have, due to the prodding and the financial assistance of the Federal Government over the last decade, it is not necessary to have some of those major clubs that we had to have in the early seventies. I think things have changed considerably.

Senator DURENBERGER. I definitely want to explore with you the corridor definition notion in that regard. Going back to our conversation about the general counsel's opinion regarding the role of States in this process, if there are any legal impediments or perceived legal impediments standing in the way of multi-State arrangements to resolve some of these problems, we ought to look at them before we consider that part of the reauthorization. I appreciate very much the skills that both of you bring here, and your testimony. I trust your commitment to work with this subcommittee as we put this whole issue in the perspective of intergovernmental relations. Not that we would want to take it out of the environmental area, but, in today's environment—as both of you have reflected—it is as much or maybe more an issue of the future of intergovernmental relations than it is an issue of the future of clean air. I thank you both very much.

Mr. CORTESE. Thank you.

Mr. GOODWIN. Thank you very much.

[The prepared statements of Mr. Cortese and of Mr. Goodwin, with attachment, follow:]



ANTHONY D. CORTESE, Sc. D.
Commissioner

The Commonwealth of Massachusetts
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TESTIMONY OF
ANTHONY D. CORTESE, Sc.D.

BEFORE THE
SENATE SUBCOMMITTEE

ON
INTERGOVERNMENTAL RELATIONS

Mr. Chairman, members of the committee, I am Anthony Cortese, Commissioner of the Massachusetts Department of Environmental Quality Engineering, and am here today as the staff chairman of the National Governors' Association's Task Force on Regulatory Reform. I appreciate the opportunity to present the views of the Nation's Governors on a number of Clean Air Act issues in which federal/state relationships are a primary concern.

I believe that I can offer a unique insight on this subject having worked at the regional and headquarters offices of EPA, as the Director of the Massachusetts Air Quality Control Program prior to becoming Commissioner of the Massachusetts Department of Environmental Quality Engineering in January, 1979.

BACKGROUND

Before I express our particular concerns and recommendations, I'd like to describe how the National Governors' Association views on these issues were developed. The NGA recommendations were developed in a policy-making process lasting more than six months, which involved a series of hearings in which divergent views were presented by leading spokesmen from the business, environmental and academic committees. The Governors and the Association of State Air Program Directors, STAPPA, worked very closely together, and the views of the two organizations are very similar. The NGA position was adopted by the Governors at their winter meeting last February, and represents a strong consensus view.

FEDERAL/STATE ROLES

Congress envisioned a strong federal/state partnership in the implementation of the Clean Air Act and its subsequent amendments. To date, this partnership has been less than ideal leading to duplication of effort, lack of trust and, at times, hostility between the states and EPA. The approach to federal/state implementation of the Clean Air Act must be changed if we are to have more cost effective achievement of clean air goals.

THE GOVERNORS HAVE MADE RECOMMENDATIONS ON A NUMBER OF ISSUES WHICH ARE GERMANE TO THIS NEED FOR CHANGE. ON ONE OF THESE, THE PROCESS BY WHICH STATES ADOPT IMPLEMENTATION PLANS FOR AIR QUALITY, CALLED SIP'S FOR SHORT, DAN GOODWIN OF THE STATE OF ILLINOIS WILL SPEAK AT MORE LENGTH. I WOULD LIKE TO SUMMARIZE OUR VIEWS ON THE GENERAL DIVISION OF RESPONSIBILITY BETWEEN THE STATE AND FEDERAL GOVERNMENTS.

AS YOU KNOW, AIR POLLUTION IS UNLIKE MANY OTHER ENVIRONMENTAL PROBLEMS IN THAT ADVERSE AFFECTS MAY BE EXPERIENCED AT LONG DISTANCES FROM THE SOURCE OF EMISSIONS. BECAUSE AIR POLLUTION IS SO PERVASIVE, WE BELIEVE A STRONG FEDERAL ROLE IS NECESSARY TO ENSURE THAT ALL STATES ADOPT AND PROPERLY IMPLEMENT A SOUND AIR QUALITY MANAGEMENT PROGRAM, IN ACCORDANCE WITH FEDERAL REQUIREMENTS. NO STATE CAN BE ALLOWED TO DO A LAX JOB AT AIR QUALITY MANAGEMENT, OR OTHER DOWNWIND STATES WILL SUFFER. NONETHELESS, WE BELIEVE THAT THE PRESENT CLEAN AIR REGULATIONS REPRESENT AN IMBALANCE IN STATE AND FEDERAL RELATIONSHIPS, AND THAT THE STATES CAN AND SHOULD BE ENTRUSTED WITH GREATER RESPONSIBILITY FOR THE DESIGN AND IMPLEMENTATION OF AIR PROGRAMS TO MEET FEDERAL STANDARDS AND REQUIREMENTS.

IN GENERAL, WE BELIEVE THAT THE FEDERAL GOVERNMENT SHOULD SET NATIONAL AMBIENT AIR QUALITY STANDARDS AND DEADLINES TO ACHIEVE THOSE STANDARDS; DEFINE REQUIREMENTS FOR BOTH PSD (CLEAN AIR) AND NON-ATTAINMENT (DIRTY AIR) AREAS; DEFINE MINIMUM SOURCE TECHNOLOGY REQUIREMENTS; AND OTHERWISE ENSURE THE SOUND DESIGN AND IMPLEMENTATION OF PROGRAMS TO IMPROVE AIR QUALITY. IN THE ACTUAL DESIGN AND IMPLEMENTATION OF THOSE PROGRAMS, HOWEVER, STATES SHOULD BE GRANTED A MUCH STRONGER ROLE THAN THEY HAVE BEEN ACCORDED IN THE PAST. MORE SPECIFICALLY, WE WOULD RECOMMEND THE FOLLOWING DIVISIONS OF RESPONSIBILITY:

- FIRST EPA SHOULD ESTABLISH MINIMUM NATIONAL AMBIENT AIR QUALITY STANDARDS, MINIMUM SOURCE TECHNOLOGY STANDARDS, AND REQUIREMENTS FOR ALLOWING NEW SOURCES IN PSD AND NON-ATTAINMENT AREAS. I WANT TO EMPHASIZE THAT A VERY LARGE MAJORITY OF THE GOVERNORS

BELIEVE THAT THE U.S. EPA SHOULD CONTINUE TO SET NATIONAL AIR QUALITY STANDARDS SET ON THE BASIS OF HEALTH EFFECTS ALONE. INDEED, IN THE GOVERNORS DEBATE ON THE CLEAN AIR ACT, THE PROTECTION OF PUBLIC HEALTH PROVIDED BY THESE STANDARDS AND THE NON-ATTAINMENT PROGRAM EMERGED AS A MAJOR CONSIDERATION.

IN ADDITION, THE GOVERNORS BELIEVE THAT NATIONAL SECONDARY AMBIENT AIR QUALITY STANDARDS TO PROTECT PUBLIC WELFARE SHOULD CONTINUE TO BE SET AT THE FEDERAL LEVEL. THE GOVERNORS WOULD RELY UPON THE SECONDARY STANDARDS TO LIMIT AIR POLLUTION INCREASES FROM NEW SOURCES IN CURRENTLY PRISTINE AREAS, IN LIEU OF THE CLASS II AND III PSD INCREMENTS.

- SECONDLY, THE STATES SHOULD DEVELOP AND EPA SHOULD REVIEW A GENERIC STATE IMPLEMENTATION PLAN FOR AIR QUALITY MANAGEMENT. BY A GENERIC PLAN, I MEAN A PLAN WHICH DESCRIBES EXACTLY AND IN DETAIL HOW THE STATES WILL MEET THE REQUIREMENTS OF THE CLEAN AIR ACT, ATTAIN AND PROTECT THE STANDARDS, ISSUE AIR QUALITY PERMITS, ETC. IN ESTABLISHING REQUIREMENTS, EPA SHOULD RECOGNIZE DIFFERENCES IN WILLINGNESS AND CAPABILITIES OF DIFFERENT STATES TO CARRY OUT THE PROGRAMS, AND NOT USE THE "LOWEST COMMON DENOMINATOR APPROACH" NOW EMPLOYED. IF A STATE FAILS TO SUBMIT AN APPROVABLE PLAN, THE EPA SHOULD HAVE THE AFFIRMATIVE RESPONSIBILITY TO WORK WITH THE STATE SEEKING NECESSARY CHANGES AND, AS A LAST RESORT, TO PROMULGATE A SIP OR A PORTION OF A SIP IF THE STATE PLAN IS UNACCEPTABLE. ULTIMATE FEDERAL ENFORCEABILITY OF THE SIP SHOULD BE ASSURED.
- THIRDLY, THE STATES SHOULD ADMINISTER THEIR AIR QUALITY PROGRAMS WITHOUT SECOND GUESSING OR THE NEED FOR CASE-BY-CASE EPA REVIEW AND APPROVAL OF ALL STATE ACTIONS AS IS OFTEN THE PRACTICE PRESENTLY. WE BELIEVE THAT STATES CAN AND MUST BE ENTRUSTED WITH THIS BASIC RESPONSIBILITY. HOWEVER, TO ENSURE THAT PROBLEMS DO NOT

ARISE, WE BELIEVE THE EPA SHOULD AUDIT STATE IMPLEMENTATION OF THE SIP BY SAMPLING PERMITS AND EMISSION LIMITS; CHECKING ACTUAL EMISSION INVENTORIES AGAINST THE EMISSION REDUCTION SCHEDULE CONTAINED IN THE SIP; AUDITING AMBIENT AIR QUALITY COLLECTION PROCEDURES AND DATA; AND PERFORMING TECHNICAL AUDITS OF DATA AND MODELS. IF SUCH AN AUDIT REVEALS A PATTERN OF IMPROPER PROGRAM ADMINISTRATION, EPA SHOULD REVISE AN OFFENDING PERMIT AND, IF NECESSARY, RESCIND APPROVAL OF THE APPROPRIATE PORTION OF THE STATE IMPLEMENTATION PLAN.

- FOURTH, EPA SHOULD ENFORCE SIP REQUIREMENTS OR PROMULGATE A SIP IN CASES WHERE A STATE HAS FAILED TO ACT AFTER REASONABLE NOTICE AND OPPORTUNITY FOR APPEAL. EPA SHOULD HAVE A RANGE OF SANCTIONS TAILORED TO THE NATURE AND MAGNITUDE OF THE PROBLEM IN PARTICULAR CIRCUMSTANCES TO ENCOURAGE STATE ACTION.
- FINALLY, EPA SHOULD CONDUCT RESEARCH AND DEVELOPMENT AND OFFER TECHNICAL AND FINANCIAL ASSISTANCE TO THE STATES IN CARRYING OUT AIR QUALITY PROGRAMS.

VESTING THESE KINDS OF ACTIVITIES IN THE FEDERAL GOVERNMENT WILL HELP INSURE CONTINUED PROGRESS TOWARDS ATTAINMENT OF THE NATIONAL AMBIENT STANDARDS, AND WILL HELP INSURE THAT STATES ARE NOT HAMSTRUNG BY DIFFERING STATE POLLUTION CONTROL REQUIREMENTS IN THE COMPETITION FOR ECONOMIC DEVELOPMENT. AT THE SAME TIME, GIVING THE STATES MUCH BROADER AUTHORITY IN PROGRAM DESIGN AND IMPLEMENTATION WILL RESULT IN MORE COST EFFECTIVE PROGRAMS TAILORED TO LOCAL NEEDS AND WILL DO MUCH TO RESTORE THE PROPER BALANCE BETWEEN STATE AND FEDERAL GOVERNMENTS IN AIR QUALITY PROGRAMS.

INTERSTATE TRANSPORT OF AIR POLLUTION

PERHAPS NO OTHER PROBLEM ILLUSTRATES THE INTERGOVERNMENTAL COMPLEXITIES IN THE CLEAN AIR PROGRAM AS WELL AS THE INTERSTATE AIR POLLUTION PROBLEM. THE FLOW OF AIR POLLUTION ACROSS STATE LINES CREATES SERIOUS INSTITUTIONAL, EQUITY, AND AIR QUALITY PROBLEMS FOR MANY AREAS OF THE COUNTRY. AS THE

NATIONAL COMMISSION ON AIR QUALITY FOUND, THERE ARE SIGNIFICANT PROBLEMS FROM THE LONG DISTANCE TRANSPORT OF A NUMBER OF AIR POLLUTANTS, PARTICULARLY THOSE RELATED TO AUTOMOBILES, AS WELL AS POLLUTANTS FROM INDIVIDUAL SOURCES KNOWN IN THE VERNACULAR AS "ACID RAIN". THE INSTITUTIONAL AND EQUITY ISSUES ARE SIMILAR FOR ALL THESE POLLUTANTS, AND INVOLVE A SIGNIFICANT COST IN TERMS OF REAL AND POTENTIAL DAMAGE AND REDUCED OPPORTUNITY FOR ECONOMIC DEVELOPMENT IN AREAS WHICH RECEIVE AIR POLLUTION FROM UPWIND STATES.

THE GOVERNORS' ASSOCIATION BELIEVES THAT THE INTERSTATE AIR POLLUTION PROBLEM MUST BE TREATED IN ITS BROADEST CONTEXT, AND THAT THE BALANCE I DISCUSSED IN FEDERAL/STATE RELATIONSHIPS MUST BE RESPECTED. IN ORDER TO MEET THESE REQUIREMENTS, WE BELIEVE THAT ANY FEDERAL PROGRAM AIMED AT CONTROLLING INTERSTATE TRANSPORT SHOULD INVOLVE THE DESIGNATION BY THE CONGRESS OF REGIONAL TRANSPORT CORRIDORS, INCLUDING BOTH SOURCE AND RECEPTOR STATES. THE EPA SHOULD BE EMPOWERED TO DESIGNATE ADDITIONAL CORRIDORS AT THE REQUEST OF AFFECTED GOVERNORS AS THE NEED ARISES. SUCH CORRIDORS COULD BE AS LARGE AS THE OHIO VALLEY-NORTHEAST U.S. REGION AND THE LA BASIN-SOUTHERN UTAH AREA OR AS SMALL AS CENTRAL KENTUCKY - SOUTHERN INDIANA AREA. BECAUSE THE PROBLEMS AND THE SOLUTIONS ARE DIFFERENT IN THESE DIFFERENT AREAS, THE STATES WITHIN DESIGNATED CORRIDORS SHOULD HAVE THE OPPORTUNITY AND RESPONSIBILITY TO AGREE ON EMISSION REDUCTIONS OR OTHER STEPS TO ALLEVIATE THEIR PROBLEMS BEFORE FEDERAL SOLUTIONS ARE IMPOSED. IF AFTER A REASONABLE PERIOD OF TIME, THE CONCERNED STATES FAIL TO REACH AN AGREEMENT, SPECIFIC ACTION BY EPA TO ABATE THE PROBLEM SHOULD BE AUTHORIZED. THIS APPROACH TO INTERSTATE POLLUTION OFFERS A NUMBER OF SIGNIFICANT ADVANTAGES OVER THE ALTERNATIVES OF EITHER DIRECTLY CONTROLLING EXISTING SOURCES OR DOING NOTHING AT ALL. THE NGA APPROACH WOULD RECOGNIZE THAT THERE IS A PROBLEM, AND THAT IT IS AS MUCH POLITICAL AS TECHNOLOGICAL. OUR APPROACH INVOLVES FEDERAL DEFINITION OF THE PROBLEM AND A MANDATE TO ACT, WHILE ALLOWING TIME FOR ADDITIONAL STUDY AND TESTING ALTERNATIVE SOLUTIONS. AND PERHAPS MOST IMPORTANT, IT RECOGNIZES THAT THE STATES ARE

EQUAL PARTNERS WITH THE FEDERAL GOVERNMENT AND GIVES THEM THE OPPORTUNITY TO FIND RESPONSIBLE SOLUTIONS WHICH FIT THEIR PARTICULAR CIRCUMSTANCES WHILE ADDRESSING A NATIONAL PROBLEM.

MR. CHAIRMAN, THANK YOU ONCE AGAIN FOR MAKING AVAILABLE THIS OPPORTUNITY TO TESTIFY. I WILL SUBMIT COPIES OF MY REMARKS FOR THE RECORD, AND WILL BE HAPPY TO ANSWER ANY QUESTIONS YOU OR THE OTHER MEMBERS OF THE COMMITTEE MAY HAVE.

JULY 22, 1981

STATEMENT OF
 DANIEL J. GOODWIN
 VICE PRESIDENT
 STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS
 TO THE
 INTERGOVERNMENTAL RELATIONS SUBCOMMITTEE
 GOVERNMENT AFFAIRS COMMITTEE
 UNITED STATES SENATE
 JULY 22, 1981

Mr. Chairman and members of the Subcommittee, my name is Daniel J. Goodwin. I am Manager of the Division of Air Pollution Control, Illinois Environmental Protection Agency. My appearance here today is also in my capacity as Vice President of the State and Territorial Air Pollution Program Administrators (STAPPA), the national organization of state air quality officials.

I appreciate the opportunity to participate in this hearing and to discuss with you my experiences, perceptions, and recommendations concerning the roles and relationships of the federal and state governments in the national air pollution control program established by the Clean Air Act.

A remarkable amount of consensus exists among state and local air quality officials, Governors, legislators, local elected officials, and the regulated industrial community concerning the need for a federally established and managed framework for state and local air quality programs. Similarly, much agreement exists with regard to the nature of the problems that exist in the present federal/state Clean Air Act relationship. There is somewhat less consensus on the best solutions to those problems. Nevertheless, it seems everyone is in agreement that the problems being experienced in this relationship are important and deserve early Congressional attention.

State/Federal Roles and Relationships Under the Clean Air Act

Congress has set out in Section 101 of the Clean Air Act the foundation for the complicated federal/state/local government structure which now exists to carry out the Nation's air pollution control program. In its statement of findings and purposes, the primary responsibility for air pollution prevention and control is assigned to state and local government:

"The Congress finds ... that the prevention and control of air pollution at its source is the primary responsibility of States and local governments" (Sec. 101(a)(3)).

This statement acknowledges the fact that most states and many local governments had developed strong, effective programs for dealing with air pollution prior to the entry of the federal government into the arena in a major role in 1970. However, Section 101 also expresses the observed

need for federal leadership and for federal technical and financial assistance in knitting together the patchwork of state and local agency efforts to deal with problems that often transcended their jurisdictional boundaries and sometimes their resources.

"The Congress finds (1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more states; (2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles has resulted in mounting dangers to the public health and welfare ... and (4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." (Sec. 101(a)(1), 101(a)(2), 101(a)(4)).

Reflective of these findings, Congress included the following in the stated purposes of Title I of the Act.

"The purposes of this title are (1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population; (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution; (3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and (4) to encourage and assist the development and operation of regional air pollution control programs." (Sec. 101(b)).

Thus, throughout the statements of findings and purposes, Congress repeatedly emphasized the enhancement of state and local efforts through technical and financial assistance and encouragement of regional approaches to air pollution control. In fact, the sole national program to be initiated as an explicitly stated purpose of the Act is one of research and development. Unfortunately, the 102 sections of the Clean Air Act which follow Section 101 do not always define requirements and procedures which are wholly consonant with the statement of findings and purposes. There is far too much prescription of detail in some areas, and the attention is concentrated too much on means, and not enough on ends.

In its reauthorization of the Clean Air Act this year, Congress would do well to consider carefully these questions:

"What are the important national or interstate issues of air pollution that should be addressed by prescription of federally-mandated elements of state and local programs?"

and

"What aspects of the federal mandate for state air quality programs do not involve important national or interstate concerns, and therefore should be left to the discretion of the states?"

Much of the effort being devoted by states to satisfying federal mandates, and much of USEPA's resources allocated to review and oversight of state programs, are being frittered away on matters that have no interstate or national significance. We spend countless hours arguing with our federal counterparts over a few tons per year of hydrocarbon emissions from a cold degreasing unit, a truly insignificant issue from a national perspective. Yet on the critical issues of interstate transport of pollutants, allocation of growth increment at state boundaries, multi-state arrangements for coordinated siting of power plants, effective exchange of information on performance of new control technology, and numerous other areas where federal leadership is sorely needed, we get hand-wringing and alibis instead.

The point here is that the bulk of the current federal manpower and expenditures under the Clean Air Act is being devoted to activities that are not directly related to the basic stated findings and purposes articulated by Congress in Section 101. It is because of this failure to keep the federal effort focused on the basics, that roles have become confused and intergovernmental relations have often been marked more by their conflicts than by their accomplishments.

State Implementation Plans

Before proceeding further into a discussion of the problems, some additional explanation of the mechanics of federal/state relationships under the Clean Air Act is appropriate.

Section 110 of the Act requires each state to adopt a State Implementation Plan (SIP) which provides for maintenance of National Ambient Air Quality Standards (NAAQS) in those areas where they are already being met, and for attainment of those standards by prescribed deadlines in areas not meeting ambient standards. The SIP must contain enforceable emission limits, compliance schedules, and other necessary regulations under state or local law necessary for attainment and maintenance of the NAAQS. The Administrator of the U.S. Environmental Protection Agency must review and affirmatively approve all elements of the SIP as being adequate, or he must eventually promulgate federal regulations to correct the deficiency.

Altogether, there are 19 elements of content which are required in a fully approved State Implementation Plan. Some of these elements are regulatory in nature, while others are merely informational. Attachment A to this statement lists the 19 elements of a complete SIP.

Once approved by the Administrator, a SIP element acquires status equivalent to a federal regulation and is enforceable in federal courts. Indeed, the review and approval procedure used by USEPA in acting on SIP submittals is a rulemaking procedure under the Federal Administrative Procedure Act. This procedure produces numerous difficulties in the state federal relationship, which I will discuss in some detail.

In short, the SIP is the aggregation of state and/or local regulations, strategies, and commitments which - taken together - produce attainment of the National Ambient Air Quality Standards and satisfy numerous other minimum program requirements placed on the states by the Clean Air Act.

The process of developing, submitting, and securing approval or disapproval of the SIP is the most important relationship between the states and the federal government that exists under the Clean Air Act. It is also the relationship that has probably produced the most friction, the most wasted effort, the most frustration, and the most disenchantment with the federal government among both state officials and the industrial community.

The Double-Key Process for Approving SIPs

The characteristic of the current SIP process which produces the greatest number of headaches is the so-called "double-key" rulemaking procedure. Under this arrangement, a SIP regulation must first undergo state rulemaking procedures, which often are every bit as formal and timeconsuming as federal procedures. Once the regulation has cleared the state process - this typically requires anywhere from two months to two years - it is then submitted for federal review and approval. This latter review, performed by USEPA, takes a minimum of four months and often more than a year. Every change to the SIP, from a minor modification of a monitoring procedure to a complete rewrite of a regulation, undergoes essentially the same kind of federal processing after state submittal. Thus, the response time for approving even inconsequential adjustments to SIP regulations is always more than six months, and is rarely less than a year. The system is much too slow, and the backlog of SIP revisions awaiting USEPA approval has grown enormous in the past two years.

There are other aspects of the double-key procedure which create problems for state officials. During the time an amended state regulation is awaiting federal approval, there can be an important difference between state legal requirements and federal legal requirements. This is particularly troublesome when a legitimate relaxation is pending federal approval and the state agency must issue an operating permit based on the revised state regulation, even though Section 116 may prohibit the issuance of a permit based on requirements less stringent than those in the approved SIP. The state agency is thus given the choice of violating state law or federal law.

Another aspect of this problem area is the pocket veto. There have been a number of instances where, rather than issuing a forthright disapproval of a proposed SIP revision it does not like, USEPA has simply failed to take any final action, effectively vetoing the change but doing it in such a fashion that appeal to the Appellate Court is not possible. This can be an effective means of denying a change in a SIP which is consistent with the Clean Air Act, but which USEPA finds undesirable.

The current concept of sequential state and federal rulemaking concerns itself far too much with details, both in the requirements themselves and in the justification demanded in order to secure federal approval. The USEPA has become so bogged down in its consideration of trivial matters, that the entire national air pollution program is exhibiting headaches and irritability - classical symptoms of constipation. To a significant degree this is a manifestation of poorly conceived administrative policies established several years ago, but it is unlikely that anything short of a major rewrite of the provisions of the Act pertaining to SIPs and SIP revision procedures can provide sufficient laxative effect to correct this particular malady.

Specifically, the concept of the SIP should be changed to one of generic rules for broad categories of sources which can be modified by the state on a site-specific basis using established procedures and criteria without further federal review. States are quite capable of maintaining sufficient integrity in their requirements that the technical and strategic underpinnings of the SIP are not jeopardized, and detailed federal scrutiny of each minor deviation from the norm is entirely unnecessary.

Furthermore, a legal presumption of federal approval of SIP revisions after some fixed period such as 90 days should be created, in order to eliminate pocket vetoes, and the effective date of the federal rule change should be retroactive to the effective date under state law.

Yet another difficult characteristic of the current SIP provisions of the Clean Air Act is that the burden of proof in justifying SIP revisions is not clearly assigned. This, coupled with the dynamic quality of USEPA approval criteria and the lengthy SIP development and approval process, makes it a minor miracle that any SIP revision is ever approved. The current provisions would be much improved if the burden were clearly placed on USEPA to justify a disapproval, so that bona fide differences of opinion between state and federal technical experts can be resolved quickly, and the continuing demands for more justification from the states can be brought to a halt. There should also be a requirement that new federal approval criteria may be applied retroactively to changes already adopted by the states only under the most compelling of circumstances.

Defining the SIP

Another problem associated with the current statutory provisions for State Implementation Plans is that of defining, at any given moment, what precisely is in the SIP. As prescribed in the Clean Air Act and implementing regulations at present, the SIP consists not only of state or local regulations, but also of data, technical analyses, descriptions of institutional arrangements, descriptions of ongoing state agency activities, commitments of resources (the legal significance of which is usually dubious), explanation of how required features of the state program will be assured, and so on.

Unfortunately, no clear distinction is made in the federal law between those SIP elements which are intended to be enforceable requirements on emission source owners or government agencies and those elements which are to be included purely for informational purposes. One example of the kind of questions this uncertainty produces would be the not uncommon finding that emission inventory data for a particular source included in the SIP and used in justifying the attainment strategy was in error, and actual emissions from the source are greater. Is the emission level used in the technical analysis legally binding, even though it was incorrect? The answer to that question is not clear. Another example of a "What is the SIP?" problem concerns inclusion by reference of state statutes or regulations which pertain to subjects in addition to air pollution. Does inclusion in the SIP of a generally applicable state government ethics law, needed to satisfy one of the Clean Air Act SIP requirements, mean that a violation of that law by a member of, say, the state horse-racing board is then a federal offense under the Clean Air Act? While I doubt that was the Congressional intent, the mechanics of the present law seem to produce that effect.

The corrective measure that is needed here is to include in the Clean Air Act explicit language which distinguishes between the various SIP elements for purposes of the type of federal review and approval needed and the nature of the enforcement action that is to be used if needed. The degree of federal review, type of approval action, and method of enforcement should be tailored to the nature and importance from a national perspective of the particular SIP element involved. This concept is presented in greater detail in Attachment A.

Administrative Procedure Act Problems

I previously made brief reference to problems in the state/federal relationship that result from the need for USEPA to observe the requirements of the Administrative Procedure Act in approval of SIPs and SIP revisions. One major concern here is the tremendous waste of time and resources which inevitably result from a process that duplicates in the federal review the formal due process and public participation provisions that usually apply during state consideration of the matter. Considerable time, confusion, and cost could be eliminated by allowing recognition in the federal rulemaking procedure of due process and public participation opportunities provided in the state's decision process.

The other major concern of state officials relative to Administrative Procedure Act requirements is the limitation on ex parte contact during USEPA's formal consideration of the state's proposal. At present state officials are given no special status in this regard. Every communication between the state and USEPA on the substance of a pending SIP approval must be documented in the federal rulemaking docket, and no discussion with state officials of the substance of the matter can occur after the close of the public comment period without jeopardizing the outcome in any subsequent court appeal. These restrictions seriously inhibit resolution of problems, particularly when sensitive political issues are involved, and treat state officials as though we are representatives of some special interest, rather than partners in protecting the public interest. Many of us find this treatment offensive. We urge that this be changed.

Sanctions

Finally, I must discuss sanctions against states and local governments which the Clean Air Act allows and sometimes mandates where SIP requirements are not satisfied.

The most widely used - and from the perspective of state officials - the most onerous and least appropriate of these sanctions is the prohibition of construction of major new or modified emission sources in nonattainment areas. The Clean Air Act provides that in any area designated as a nonattainment area with respect to the NAAQS for a given pollutant, construction of a major new source or a major increase in emissions resulting from modification of an existing source of that pollutant may not begin after July 1, 1979, unless certain key elements of the SIP for the area have been adopted by the state and approved by USEPA.

The theory here was that a moratorium on growth in a polluted area would provide political pressure needed to offset resistance by local industry to adoption of the necessary corrective measures. Without question, it had that effect in many areas of the country and resulted in faster action by the states than otherwise would have occurred. Unfortunately, USEPA's response to the state's submittals has not been at all timely in most cases, and consequently, many areas of the country remain under the moratorium today because of federal inaction. According to the most recent report from the USEPA, which is dated March 9, 1981, the construction ban remained in effect in one or more areas of 32 states and territories. The punishment continues whether or not it is deserved.

A second argument against continuation of the mandatory permit moratorium is that it penalizes industry - particularly industry that wishes to move into an area - for failures that they may have no ability to correct. For example, local officials in three northern Kentucky counties adjoining the Cincinnati area have chosen to accept federal sanctions, including the growth moratorium, rather than implement a motor vehicle emission inspection program. Is it really fair or wise to prohibit

industrial property owners from building or expanding in those counties, when they may have little practical ability to change the local officials' decision? Is it fair to the unemployed construction or factory workers who could be put back to work?

The third argument against the growth moratorium is that it has lost its effectiveness. This is because of two factors: (1) it is now known that sufficient loopholes are available that relatively few projects cannot legally proceed with construction despite the moratorium, and (2) most of the SIP revisions needed to remove the sanctions have either been adopted and are awaiting federal approval, or have been consciously rejected by state or local governments in an explicit choice to accept the sanctions instead.

STAPPA's members believe the growth moratorium has outlived its usefulness and now causes more problems than it solves. To use a trite metaphor, it is a meat-ax, and what is needed is a scalpel. That scalpel, we believe, should be a more credible threat of USEPA promulgation of a federal rule to correct a state SIP deficiency. Because USEPA has traditionally been very reluctant to use this approach, most states do not regard it as an incentive for action to correct a SIP deficiency. Yet we believe that a clear, credible policy of prompt action by USEPA to promulgate a federal rule to correct an important SIP deficiency would be a highly effective and appropriate means of inspiring state corrective action. If a deficiency is not important enough to deserve the effort needed for a federal promulgation, it is not important enough to warrant a sanction against the state.

A more complete discussion of problems associated with SIP requirements of the Clean Air Act and the package of remedies proposed by STAPPA is contained in an issue paper included as Attachment B to this statement.

Enforcement

As presently written, Section 113 of the Clean Air Act mandates federal enforcement action against any major source determined not to be in compliance for more than 30 days, even if the state has already begun enforcement or indicates its intention to do so. This enforcement action is normally brought in the appropriate U.S. District Court, and often is pursued in parallel with state administrative or judicial action on the same violations. Furthermore, in the case of SIP violations, it involves interpretation of SIP requirements which sometimes differ from state agency interpretation. The Act as now written gives the USEPA the lead enforcement role in any case it chooses to pursue, and provides little discretion in choosing those cases. Little distinction is made between those violations being addressed by state enforcement action and those which are not.

The effect of this assignment of roles is to create a relationship between federal and state enforcement officials which is uneasy at best and frequently is characterized by outright mistrust. State officials often disagree with federal handling of cases - viewing federal officials as being heavy-handed and more concerned with "carving another notch on their pistol" than with securing sound solutions to genuine environmental problems. Every state air pollution program director knows what is meant by a reference to USEPA "bean-counting".

Nevertheless, we believe that a strong federal enforcement capability is useful and needed. The knowledge that federal enforcement is likely if state efforts are not successful is an important incentive to violators to resolve their problems with the state. We do believe, though, that state agencies often have better data and more thorough understanding of the reasons for noncompliance and of the likelihood that formal enforcement will increase the prospects for an early solution. Many states feel that insufficient effort is made by USEPA and the Justice Department to consult with states on enforcement actions, and that state advice on settlement provisions is often ignored.

We also disapprove of USEPA's practice of using contractors for performing compliance inspections to audit and verify results of state conducted inspections. This practice of using "hired guns" is wasteful and represents an inappropriate approach to USEPA's legitimate oversight function. Frequently, state officials are called upon to spend substantial time and effort in providing information from state agency files in order to assist these contractors. If these audits are to be done at all, they should be done by federal employees only.

STAPPA's members believe that too large a fraction of the available resources of USEPA is being devoted to direct federal enforcement at a time when vital federal training programs needed to assist state and local officials in carrying out their enforcement responsibilities have been cut drastically. We do not think this makes sense, nor is it consistent with the assignment of roles suggested in Section 101 of the Clean Air Act.

Financial Assistance to States

State officials recognize the realities of federal program reductions and shrinking grant funds that must result from the current efforts to control federal spending. We also know, though, that with sluggish economic conditions and pressure to replace reduced federal funds in other state and local programs, the prospects for offsetting with increased state funds the effects of federal funding cuts and reduced purchasing power due to inflation are very dim. Yet the very demanding burdens of the Clean Air Act remain on the states, and it is important that we not lose momentum in our efforts to eliminate adverse health impacts on large segments of our society caused by air pollution. Our response must be one of improved efficiency and constant attention to priorities. Congress must help us in that by providing in the law more flexibility for states to use what federal funds are available in the

most effective ways we can find. We must also be allowed to conduct state programs directed at meeting national air quality goals as free as possible from unproductive requirements for paper-shuffling and dancing of bureaucratic minuets, so we can concentrate on getting the air clean and keeping it that way. Mechanisms must be provided for setting and adhering to priorities - priorities which must reflect both state and national needs.

Conclusion

In conclusion, the problems state air quality officials have observed in the state/federal relationship under the Clean Air Act are mostly procedural, not substantive, and the changes needed are mostly procedural changes.

STAPPA has adopted recommendations on a number of changes to the Clean Air Act, including some not discussed in this statement. Those recommendations are included as Attachment C. I hope you will consider them carefully. State air quality officials have been and will continue to be committed to carrying out an effective national program to assure clean, healthful air for all our citizens. We believe a strong federal mandate to the states is needed in this area, and we accept without hesitation the critical role Congress has asked us to play in pursuing the important national goals which underlie the Clean Air Act.

DJG:ct/1570C,sp1-10

Attachment A

CONTENT REQUIREMENTS FOR STATE IMPLEMENTATION PLANS

AND

RECOMMENDED TREATMENT FOR FEDERAL REVIEW
AND ENFORCEMENT

SIP ELEMENT	TYPE OF REVIEW(1)	DIRECT FEDERAL ENFORCEMENT(2)
1. Designation of attainment/nonattainment status	R	N/A
2. Emissions inventory	I	N/A
3. Attainment and maintenance strategy (including reasonable further progress)	R	No
4. Emission limitations (including RACT determinations)	R/VO	Yes
5. Compliance schedules	R/VO	Yes
6. Compliance monitoring methods	R/VO	Yes
7. Transportation control measures	I	No
8. Vehicle inspection program implementation schedule	A	No
9. Generic rules for nonattainment area new source permits	R	Yes
10. Generic rules for PSD permits	R	Yes
11. Ambient air monitoring program	A	No
12. Enforcement program	A	No
13. Provision for annual progress evaluation and reporting	A	No
14. Assurance of adequate personnel, funding, and authority	A	No
15. Health emergency response capability	A	No

SIP ELEMENT	TYPE OF REVIEW(1)	DIRECT FEDERAL ENFORCEMENT(2)
16. Composition of state boards, conflict of interest	A	No
17. Provisions for intergovernmental consultation	I/A	No
18. Provisions for public notification	A	No
19. Provisions for permit fee system	A	No

EXPLANATION OF SYMBOLS

(1) R = Federal rulemaking

I = Informational submittal only

R/VO = Federal rulemaking for generic rules; no federal approval required for site-specific changes which are consistent with approved strategy and set out in variance orders or operating permits (e.g. bubbles)

A = Initial federal approval, federal audit of state compliance

I/A = Informational submittal only for intrastate consultation, federal audit of state compliance for interstate consultation

(2) "Direct federal enforcement" means direct enforcement against a source. "No direct federal enforcement" means that compliance would be the legal responsibility of the state, and federal enforcement would normally involve insistence that the state comply or assure compliance with the requirement. "N/A" means "not applicable".

ATTACHMENT B

STATE and TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS

PRESIDENT

James K. Hambright
Pennsylvania

VICE-PRESIDENT

Daniel J. Goodwin
Illinois

SECRETARY-TREASURER

Bill Stewart
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EXECUTIVE SECRETARY

William Becker

THE STATE IMPLEMENTATION PLAN

UNDER THE

CLEAN AIR ACT

POSITION OF THE

STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS

ON NEEDED CHANGES

MARCH, 1981

THE STATE IMPLEMENTATION PLAN UNDER THE CLEAN AIR ACT: PROBLEMS AND REMEDIES

The Clean Air Act establishes a national program intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population". This national goal is to be obtained by a regulatory scheme which provides that the states will adopt "State Implementation Plans" designed to attain and maintain air quality which meets standards set by the U.S. Environmental Protection Agency. These Plans (SIPs) must also satisfy other requirements not related to air quality. Once a SIP (or a revision to a SIP) has been adopted into state law, it must then be approved by USEPA. This approval takes the form of federal rulemaking, and the federally-approved SIP becomes a federal regulation. This arrangement assures that state air pollution requirements are backed up by strong enforcement capability, and provides opportunity for citizen suits to enforce state requirements.

State air pollution control agencies have become increasingly frustrated, however, by the cumbersome and uncertain process involved in establishing, obtaining federal approval of, and revising State Implementation Plans. This issue paper discusses briefly some of the problems states have experienced in this regard and remedies to those problems that should be considered in connection with the upcoming reauthorization of the Clean Air Act.

MAJOR PROBLEMS

Defining the SIP -- There is considerable uncertainty as to what, precisely, constitutes the SIP for a given state at a given moment in time, and what the legal significance of some of the elements of the SIP may be. Of particular concern are questions relating to SIP revisions which have been adopted by the state but which have not yet received federal approval. Another source of concern is the legal significance of SIP elements which have been conditionally approved, when USEPA does not consider the conditions to have been met. Also troublesome is the federal enforceability of state statutes and other requirements (e.g. state ethics rules for state officials) which are the basis for satisfying certain non-air quality related SIP requirements but whose scope or applicability extends far beyond the state's air quality program.

Duration and uncertainty of USEPA review -- The bare minimum time in which USEPA can complete action on a SIP revision, assuming expeditious processing, is about four months. Recent experience has shown that a year or more is a reasonable estimate of turnaround time for routine processing, and many states currently have pending SIP revisions which have awaited action for two years or more. Current indications are that processing time and the backlog of SIP actions awaiting federal approval will continue to grow. Because of the way in which the USEPA review is structured, significant issues can surface and become obstacles to final approval at any stage of the review; thus there is cause for uncertainty

as to outcome throughout the review period. This uncertainty is exacerbated by frequent changes in USEPA approval criteria, which may result in disapproval of a change which would have been approved using criteria in effect at the time of submittal.

No deadline on SIP approval -- The statute provides no deadline for federal action on SIP revisions, even when the Part D permit moratorium (discussed below) is in effect. This allows industrial modernization or growth in a nonattainment area to remain blocked indefinitely if USEPA chooses to "pocket veto" a proposed SIP revision, a situation which has occurred in numerous areas of the country.

Permit moratorium -- The CAA specifies (in rather ambiguous language) that permits to construct major new sources or modifications of existing sources of a specified pollutant may not be granted after July 1, 1979 in nonattainment areas for that pollutant unless there is an approved SIP for the area. Despite good faith efforts by most states, the permit moratorium remains in effect in many areas of the country. Since one of the requirements that must be met in order to get a permit is the provision of a net air quality improvement in the area as a result of the project, the permit moratorium is counter-productive. It is also an example of the kind of heavy-handed federal blackmail which has created undesirable and unnecessary friction between the federal and state governments in the air quality program.

Burden of proof -- The Clean Air Act does not clearly establish the burden of proof for justifying SIP revisions. It says that the Administrator of USEPA "shall approve revision of any implementation plan ... if he determines that it meets the requirements" of Section 110. It does not prescribe how much latitude the Administrator has in overriding state judgments on the qualitative adequacy of the SIP. This is particularly troublesome where difficult technical judgments have been made or where enforceability of SIP provisions under state law is in question.

Excessive detail -- USEPA's policy is that the provisions of SIP revisions must be sufficiently specific, detailed and unambiguous that there can be no reasonable doubt as to what the SIP requirements will be for any given source. This policy was adopted under the banner of assuring federal enforceability, since USEPA does not generally consider state operating permit conditions (the vehicle used by many states to spell out the details) to be federally enforceable. This means that state regulations must become excessively detailed and too much energy must be devoted to defining details that are better left to a permit review procedure or comparable mechanism.

No provision for variances -- There is no satisfactory provision in the federal statutory scheme for handling the inevitable special cases which most states treat as variances. These variances may be permanent or temporary, and may apply to emission limits or to compliance schedules. Long-term variances can be treated as SIP revisions, but short-term relief is not possible under the federal system. By the time a three-month

extension of an interim compliance deadline can receive SIP approval, for example, the new date will have long passed -- thus leaving the source exposed to federal or citizen legal action even though the state may have granted a change which cannot legally be disapproved by USEPA.

Ex parte contact -- Under current law, USEPA must follow the requirements of the federal Administrative Procedure Act in performing its SIP review and approval function, since this is considered to be federal rulemaking. A serious obstacle to resolution of problems with proposed SIPs is placed between state and USEPA officials as a result, since any communications between the state and USEPA following the publication of the Notice of Proposed Rulemaking by USEPA in the Federal Register must be made a part of the public record, and no discussion of the substance of the proposal is allowed after the close of the public comment period. This hampers communications and inhibits the resolution of sensitive issues.

NEEDED CHANGES

The following changes to Clean Air Act policies and procedures related to State Implementation Plans are proposed. To the extent that such changes can be accomplished administratively, i.e., without legislation, the administrative course of action is generally preferred. For those changes which cannot or will not be made by administrative action, legislative action to bring about the change is proposed.

1. Add clarifying language which distinguishes between the informational and the enforceable elements of the SIP. Provide for recognition of state laws and other legal requirements without their becoming federal rules.
2. Accord federal recognition to state operating permits issued pursuant to rules and procedures contained in the SIP, making such permits federally enforceable, and thereby eliminating the need for individual site-specific SIP revisions.
3. Modify the SIP revision process by giving recognition to state public participation and due process procedures which achieve the same ends as the federal Administrative Procedure Act procedures. Require USEPA to participate formally in the state adoption process, and bind USEPA to adhere to formal positions taken there unless new information or new legal requirements (such as a court ruling) dictate otherwise. Allow retroactive application of new policies only under extreme justification.
4. Provide for deadlines on USEPA review and approval action, with provision that failure to act constitutes approval.
5. Make the effective date of SIP revisions retroactive to the effective date under state law.

6. Eliminate the permit moratorium as a sanction. Use federal promulgation (as currently mandated, but rarely done) to provide the incentive for state action.
7. Place the burden of proof on USEPA to establish that effects of proposed SIP revisions claimed by the state as justification for the changes are in fact wrong, before such error can be used as a basis for disapproval.
8. Prohibit a priori judgements by USEPA concerning state enforceability of SIP requirements as a basis for disapproval of SIP revisions.
9. Provide that short-term variances can be granted by the states if they meet certain substantive and procedural tests, without need for SIP approval.
10. Specifically provide that contact between state officials and USEPA may be excluded from the ex parte prohibitions of the APA. (This may need an amendment to the APA, rather than the CAA.)
11. Eliminate conditional approval as an available course of action. Use partial approval in its place.

State air quality officials believe that these changes, if adopted, would greatly improve the federal-state relationship, would remove much of the debilitating complexity of the present scheme, and would allow federal officials to concentrate on matters which are of true national or interstate significance, leaving the bulk of the detailed administrative decisions with state and local officials. These changes will enhance the ability of both the federal government and the states to advance toward the shared goal of clean, healthful air for everyone.

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ATTACHMENT C

STATE and TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS

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EXECUTIVE SECRETARY

William Becker

POSITION ON

AMENDMENTS TO THE CLEAN AIR ACT

OF THE

STATE AND TERRITORIAL AIR POLLUTION PROGRAM ADMINISTRATORS

ADOPTED DECEMBER 10, 1980 AND JUNE 22, 1981

A STATEMENT OF PRINCIPLES WHICH MUST BE THE BASIS OF
ANY AMENDMENTS TO THE CLEAN AIR ACT

Air pollution remains a continuing national health and welfare problem which imposes substantial social and economic costs on the American people.

The primary goal of air pollution control programs throughout the country must remain the expeditious attainment of healthful levels of ambient air as defined by national health-based standards.

More effort must be made to identify and limit the exposure of the public to airborne carcinogens, mutagens and other hazardous compounds.

Pollutant levels must be reduced which cause damage to agricultural crops and natural resources even if these levels do not injure humans directly.

Air quality deterioration must be kept to a minimum in areas of outstanding scenic and recreational value, such as national parks and wilderness areas.

An effective regulatory program administered by a partnership of federal, state and local governments is essential to achieving air quality goals.

Administrative complexity and delay can be reduced by delegation of additional authority from the federal government to state and local governments.

Effective federal oversight remains essential to carry out the national mandate to achieve air quality goals and to help resolve inter-state and inter-regional pollution problems.

Adequate federal technical and economic assistance to state and local air pollution control programs must be provided so that these agencies can carry out their responsibilities.

Air quality goals cannot be achieved without the continued effective control of motor vehicles at the national level. Recent advances in automotive control technology must be maintained and where appropriate refined to provide greater durability.

The nation's air resource should be managed in a manner which, over time, minimizes the effect of control costs on the economy.

The use of the best control available on new and expanding sources remains a highly effective and necessary means of achieving air quality goals over time at reduced cost.

The way to achieve the greatest pollution reduction for the least cost is to administer air pollution control programs in a way that encourages technological and economic innovation and modernization by the private sector.

STATE IMPLEMENTATION PLANS

The following changes to Clean Air Act policies and procedures related to State Implementation Plans are proposed. To the extent that such changes can be accomplished administratively, i.e., without legislation, the administrative course of action is generally preferred. For those changes which cannot or will not be made by administrative action, legislative action to bring about the change is proposed.

1) Clarify the distinction between the informational and the enforceable elements of the SIP. Provide for recognition of state laws and other legal requirements without their becoming federal rules.

2) Modify the SIP revision process by giving recognition to state public participation and due process procedures which achieve the same ends as the federal Administrative Procedure Act procedures. Require USEPA to participate formally in the state adoption process, and bind USEPA to adhere to formal positions taken there unless new information or new legal requirements (such as a court ruling) dictate otherwise. Allow retroactive application of new policies only under extreme justification.

3) Specifically provide that contact between state officials and USEPA may be excluded from the ex parte prohibitions of the APA. (This may require an amendment to the APA, rather than the CAA.)

4) Provide that short-term variances can be granted by the states if they meet certain substantive and procedural tests, without need for SIP approval.

5) Make the effective date of SIP revisions retroactive to the effective date under state law.

6) Provide for deadlines on USEPA review and approval action, with provision that failure to act constitutes approval.

7) Prohibit a priori judgements by USEPA concerning state enforceability of SIP requirements as a basis for disapproval of SIP revisions.

8) Place the burden of proof on USEPA to establish that effects of proposed SIP revisions claimed by the state as justification for the changes are in fact wrong, before such error can be used as a basis for disapproval.

9) Eliminate conditional approval as an available course of action. Use partial approval in its place.

10) Eliminate the permit moratorium as a sanction. Use federal promulgation (as currently mandated, but rarely done) to provide the incentive for state action.

11) Accord federal recognition to state operating permits issued pursuant to rules and procedures contained in the SIP, making such permits federally enforceable, and thereby eliminating the need for individual site-specific SIP revisions.

NONATTAINMENT

With greater responsibility, the states can and should be able to accommodate new industrial growth in nonattainment areas in accordance with a policy of achieving net air quality benefits and ensuring reasonable further progress toward attainment of the standards.

STAPPA supports the establishment of deadlines for the achievement of ambient air quality standards. The Clean Air Act should contain a provision allowing EPA to provide an extension for areas with severe and persistent air quality problems. For an area to qualify for such an extension, further emission reductions would have to be implemented over time. Failure to implement such strategies successfully should result in federal sanctions, tailored to the magnitude and nature of the failure.

The Lowest Achievable Emission Rate (LAER) requirement for new sources in nonattainment areas is a limitation on economic development in urban areas with no significant improvements in air quality and encourages urban sprawl. All new sources larger than 50 tons per year should be evaluated equally under the Best Available Control Technology (BACT). The LAER concept should be dropped.

The current provisions for use of offsets and SIP growth margins should be retained.

PREVENTION OF SIGNIFICANT DETERIORATION

- 1) Eliminate the incremental limits for air quality degradation for Class II and Class III areas;
- 2) Eliminate short-term increments for Class I areas;
- 3) Require BACT for all new sources in attainment and unclassified areas;
- 4) Change the PSD applicability threshold for all source categories to 100 tons per year after control for new sources and for aggregate increases of 100 tons per year for modified sources;
- 5) Retain the current requirement that NAAQS may not be violated;
- 6) Eliminate mandatory pre-application monitoring and modeling except where the state determines it to be necessary to demonstrate that NAAQS (or Class I increments, where applicable) will not be violated; and
- 7) Include fugitive sources of criteria pollutants in emission totals.

LONG RANGE TRANSPORT

Implementation of an overall, direct control strategy for long range transported air pollution will require legal authority beyond that which currently exists in the Clean Air Act and most State air quality control laws. In order to provide a sound legal basis for the necessary control actions it is recommended that the federal Clean Air Act be amended, particularly Sections 110(a)(2)(E) and 126, to provide specific authority to deal with all long range transported air pollution. The wording of this amendment of the Act should not be unduly specific as to the methods required to control such problems, which are still to be identified and understood.

In order to deal with the particular transported problem of acid rain, initial steps to reduce actual sulfur oxide and nitrogen oxide emissions, therefore acid deposition, should be aimed at the most cost-effective methods and obvious sources. An emissions ceiling for sulfur dioxide from major existing fuel-burning sources should be established (which may be higher than RACT), with further control reductions identified as additional research and better understandings are developed. This sulfur dioxide limit could be applied over all affected plants in a State or multistate area, to allow consideration of individual plants technology and economics (bubble).

To provide a better information base and to reflect the effects of acid rain, there should be expanded ambient acid deposition monitoring using standardized methods of sampling and analysis.

FEDERAL PROGRAM GRANTS

- 1) STAPPA reaffirms its support of the current Section 105 Grant mechanism in the CAA as the preferred alternative for Federal support of state air programs.
- 2) STAPPA opposes a switch to consolidated or block environmental grants unless there are sufficient safeguards against the transfer of air program funds to other programs such that air program objectives are jeopardized.
- 3) Since EPA is currently in the process of reviewing various alternatives to 105 funding, EPA should be requested to provide for STAPPA's involvement in this process.

MISCELLANEOUS.

Funding

States should be provided additional Federal funds for implementing their air pollution control programs, in an amount commensurate with increased delegated responsibilities.

Coal Conversions

Voluntary coal conversions should be subject to the same requirements as mandatory coal conversions.

Senator DURENBERGER. The next panel of witnesses this afternoon represents local governments' perspective.

Mr. Wayne Cropp is the director of the Chattanooga-Hamilton County Air Pollution Control Bureau. He is here today on behalf of the Association of Local Air Pollution Control Officials [ALAPCO]. Mr. Walter Rockenstein, representing the National League of Cities, comes from my area of the country—Minneapolis—where he is an alderman in a ward next to mine. Finally, Mr. Bob Offutt is with us today from Louisville, Jefferson County, Ky.

Jim Sasser asked me, Wayne, to extend a welcome to you on his behalf since I think he is over there trying to goof up the tax bill [laughter] right now on behalf of social security recipients or whatever. He told me how much he appreciates your insight into this particular area. He wanted me to be sure to make you feel at home.

Mr. Cropp. Thank you.

Senator DURENBERGER. At this point I will insert the statement submitted by Senator Sasser.

[The statement follows:]

OPENING STATEMENT OF SENATOR SASSER

I would like to compliment Senator Durenberger for his initiative in reviewing the effective and efficient implementation of the Clean Air Act in this subcommittee. I am for an effective Clean Air Act, and so I am sympathetic to the need to bring in the greatest cooperation from all levels of Government in its implementation. I expect these hearings will further that necessary intergovernmental cooperation.

Today, I have the pleasure to introduce Mr. J. Wayne Cropp, director of the Air Pollution Control Bureau of Chattanooga-Hamilton County, Tenn. Mr. Cropp will broaden our understanding of a local administrator's concerns for improving the implementation of the Clean Air Act.

Mr. Cropp is extremely qualified to do so. Air quality in Chattanooga has improved under Mr. Cropp's administration. He has proven to be an effective advocate of clean air in that area of my State. Moreover, Mr. Cropp is vice president of the Local Air Pollution Control Officers' Association. His views should be of value to the subcommittee today.

I therefore want to welcome Director Cropp to the subcommittee.

Senator DURENBERGER. I guess it sounds self-serving, but I am supposed to start with Walter Rockenstein. Would you present your statement first? Then we will go with Bob and then Wayne, if that is all right.

TESTIMONY OF WALTER ROCKENSTEIN, MEMBER OF CITY COUNCIL, MINNEAPOLIS, MINN.; ROBERT T. OFFUTT, SECRETARY-TREASURER, AIR POLLUTION CONTROL, DISTRICT OF JEFFERSON COUNTY, KY.; AND J. WAYNE CROPP, DIRECTOR, AIR POLLUTION CONTROL BUREAU, CHATTANOOGA-HAMILTON COUNTY, TENN.

Mr. ROCKENSTEIN. Thank you, Senator. I am Walter Rockenstein, an alderman elected by the residents of the 11th ward of Minnesota. I am testifying today on behalf of the National League of Cities. This is a shortened version of my entire statement which I would like entered into the record.

It is an honor to be here this afternoon to address the intergovernmental relationships established in the Clean Air Act. The National League of Cities believes that the roles and responsibilities of each

level of government provide the foundation for achieving clean air goals. We appreciate the opportunity to speak on the issue.

I would like to first summarize our general position on the Clean Air Act and then address the specific Federal, State, and local responsibility questions which you asked.

Protection of public health and encouragement of local economic stability and growth are two of the highest priorities of the League. The need to balance these two priorities, and NLC's concern that the protection of one not diminish the other, guide our position on reauthorization of the Clean Air Act.

The National League of Cities agrees with the conclusion of the National Commission on Air Quality that the structure of the act is sound and does not need fundamental changes. There can be no question that the Clean Air Act has resulted in significant improvements in air quality and public health.

The accompanying map of the Twin Cities shows one important benefit in our metropolitan area. The light shading represents portions of the metropolitan area that, in 1970, suffered unhealthy levels of sulfur dioxide and suspended particulates. Young children, the ill, and older people are especially susceptible to such pollutants. In 1970 the affected area contained 140 elementary and junior high schools, 12 hospitals, 57 long-term care facilities, and two convalescent and nursing-care facilities. By 1979 the affected areas had shrunk to the four darker shaded areas. Within those four small areas were 31 elementary and junior high schools, 4 hospitals, and 5 long-term care facilities—a significant improvement from the situation in 1970.

Although the costs of compliance are often high, the League knows this cost cannot be avoided—either today as an investment in compliance to protect the health of our constituents and the vitality of our communities, or in the future as dirty air causes burgeoning health costs and forces rescue missions to revitalize distressed cities.

Mr. Chairman, you asked us to address the appropriate balance between national uniformity and State and local discretion. NLC believes this must be of central concern when amending the Clean Air Act. Thus, we are constantly mindful of maintaining that balance.

First, the Federal role. Although States and local governments have the primary responsibility for protecting public health and safety, the Federal Government plays an essential role in assuring clean air. National standards and consistent enforcement provide the framework for attaining clean air and preventing deterioration. NLC supports maintaining these provisions in order to minimize interstate conflict and competition. Without uniform and enforceable national clean air standards, States and local governments would be tempted or forced to reduce local air pollution standards to attract new industrial development. Only a national standard insures that long-term national health interests will not be traded away in the day-to-day competition for community economic development.

NLC continues to support federally determined deadlines to assure progress toward attainment. Some areas will not be able to meet even extended deadlines. However, a waiver should be granted only if an area has made a good faith effort to implement all reasonable strategies during the period prior to the request. Deadlines will have little credibility if they are changed or removed for the convenience of those who do not comply.

For the same reasons the National League of Cities supports sanctions. Sanctions provided the teeth to enforce deadlines.

New car emission standards are clearly a Federal responsibility, as are strict emission control requirements on all new major sources. The only effective way to control emissions is at the source. There is little that a State or local government can do to control pollution once pollutants are in the air. Relaxation of these provisions will create pressure to extend the deadlines, seriously delaying compliance and endangering public health.

Second, State and local discretion. State and local discretion should include both the design and implementation of air quality programs within the framework of Federal standards, deadlines, and technology requirements. A periodic audit of a State's progress by EPA, rather than a day-to-day involvement in each permitting decision or control plan, will streamline the administration of the act. This will require a change in the State implementation plan process.

Today virtually each modification in a State implementation plan, no matter how minor, requires a complete plan revision. This entails public hearings and other Federal administrative procedures which are extremely time-consuming and duplicative of State and local efforts. You have heard a great deal of testimony on that today. While this lengthy revision process winds on, every State and local air pollution regulation and permit hangs in a state of legal uncertainty for months or even years.

The National League of Cities recommends an improved approach to the Federal-State partnership on implementation of the Clean Air Act in two parts.

First, State implementation plans should be written by State and local governments in a generic format and then be approved by the Environmental Protection Agency. I think several witnesses have spoken on what might go into a generic SIP.

State and local governments should then be permitted to make needed changes in their regulations, enforcement programs, permitting processes, and their particular mix of transportation controls without requiring a federally-approved amendment to the State implementation plan.

Second, two measures should be used to assure that this new flexibility does not result in State and local governments falling behind in meeting compliance deadlines. The Environmental Protection Agency should periodically audit State and local government performance to insure that permits issued, programs executed, and enforcement actions undertaken comply with the State implementation plan.

Also, an appeal mechanism should be established within the Environmental Protection Agency permitting those who disagree with a specific State implementation plan change, or the terms of an operating permit, to raise the issue before the agency.

The League believes these changes would enable State and local governments to implement air prevention and control programs more easily, while at the same time reducing the administrative burden now on the Environmental Protection Agency.

Third, interstate transport. The transport of pollution between States, as well as between areas within individual States, is a major air quality problem. Mr. Chairman, you have already noted the prob-

lem in Minnesota with acid rain. As a first step in dealing with this complex problem, the National League of Cities joins the National Governors' Association in asking Congress to enact a three-step process which I have outlined in my statement.

Congress should also keep in mind that a switch from mandatory to discretionary inspection and maintenance, technology standards, secondary standards, et cetera, will increase interstate transport of pollution and exacerbate interstate conflict. Air pollution does not respect local, State or even national boundaries.

We appreciate the opportunity to express our concerns to you, Mr. Chairman, and to the members of the subcommittee. The National League of Cities strongly supports a cooperative Federal, State and local effort in the prevention and control of air pollution. The Nation's cities take seriously their responsibility in this national effort. We hope the improvements to the act, which the League has suggested today, will save time and cost without sacrificing the attainment and maintenance of air quality.

Thank you.

Senator DURENBERGER. Thank you very much.

Bob?

Mr. OFFUTT. Thank you. I speak today for the National Association of Local Air Pollution Control Officials. The association represents more than 220 local air pollution control programs in metropolitan areas in which more than 90 million people live. Many of these local programs predate their State counterparts and the Federal law. The expertise and value of local programs in the air quality planning process has been recognized by Congress.

It is important to note that, unlike Federal programs, local programs for air pollution are not required. They exist because there is a strong concern for clean air on the local level.

In times when resources are scarce, it is prudent for us to carefully define roles and eliminate costly and duplicative processes.

There is a place, a significant place, for all levels of government in a clean air effort. In developing and implementing policies to deal with clean and dirty air areas, it is important that we consider economic equities and realities. Under existing policies, older cities can easily lose their industries. It is almost impossible to attract new industry under Federal regulations today. A continuation of the existing policy will result in further dwindling of jobs in metropolitan areas.

The association believes that the proper role of the EPA involves the performance of tasks which are beyond the scope of State and local programs. An example of this is the setting of national ambient air quality standards. If this is to be done in any equitable manner whatsoever, both primary and secondary standards must be set at the Federal level. We believe that primary standards should be set on the basis of health.

The tracking of technology and making recommendations on technology to be implemented in State implementation plans is a logical role for EPA to play. They have the resources and the abilities.

Expedient approval of State implementation plans is another role that EPA should perform. Nearly every State implementation plan now rests somewhere in that twilight land of pending review, under approval, or conditional approval. Turn-around time needs to be re-

duced. There needs to be a strong Federal presence in the adoption, the development and the implementation of State implementation plans. Without it, equities between States, between communities, could never be maintained.

Pollutant transport and interstate disputes is another area in which the Federal Government must participate. Pollutant transport, whether you are talking about short-range or long-range, does exist. We believe that there is sufficient evidence now to merit some reasonable controls in the long-range. Since these incorporate controls that are multi-State in nature, the possibility of disputes is high. Therefore, the Federal role is needed.

The States and locals must develop and implement State implementation plans. They should be allowed maximum flexibility in doing this.

I believe most State and local programs are conscientious and do want to do a good job. But they should be treated as though they are attempting to do a good job.

The split of responsibilities between the State and local programs should be defined by the State government at home, not in Washington. There are a lot of local programs that have full State implementation plan authority. Others have less authority. In many cases, EPA does not recognize existing State laws where these splits are made. Regardless of the program size, regardless of the authorities granted to the local program, the responsibility must be there for local consultation. Many of the control measures that are to be put into SIPs must be implemented at the local level. Therefore, local consultation is important.

Returning for a minute to the interstate dispute question, I would like to just briefly cite the Louisville experience as an example of the problems you can run into.

When we developed the first State implementation plan, back in 1972, the State of Indiana and the State of Kentucky decided on a limitation of 1.2 pounds per million Btu per hour heat input on sulfur dioxide was necessary to achieve the standards. Under agreement, both States adopted that in 1972. Now we are talking about a metropolitan area involving three counties—Floyd and Clark Counties in Indiana and Jefferson County in Kentucky.

In 1975 Indiana petitioned to change those standards. EPA published their intent to disapprove in the Federal Register. One year later, without any warning or anything, EPA suddenly published approval. Now we had a condition where the standards on one side of a metropolitan area were five times as stringent as the other. In fact, one side doesn't even have to have controls.

The 1977 amendments to the Clean Air Act caused the State implementation plans to be revised. Indiana indicated their intent to keep the same standards they had had. We did participate in their public hearing process, saying that the wide discrepancy was not equitable. This was done to no avail.

On May 14, 1979, we petitioned the Administrator of EPA to hold a hearing and resolve this issue under section 126 of the act. We couldn't get a hearing set up, and we had to issue the required 60-day legal notice of intent to sue the Administrator to get a hearing. It was set up finally, and on April 17, 1980, the hearing was held.

The end of October rolled around, and twice the amount of time allowed under section 126 had expired. So we decided enough time had gone by and we again issued legal notice against the Administrator of EPA requesting a ruling on our section 126 petition.

The 60-day period expired, so in December we went before the courts. On May 29 of this year we got a ruling from the U.S. District Court for the Western District of Kentucky requiring EPA to render a decision within 60 days. The way I count, that is the 29th of this month. It is the 22d now. We haven't heard anything from them yet. I strongly suspect we will be back in court again.

Senator DURENBERGER. I haven't heard anything from them in 6 months. [Laughter.]

Mr. OFFUTT. If we can't handle disputes between States in the same metropolitan area, it is almost impossible for me to believe that section 126 could be anything like adequate in dealing with interstate disputes on acid rain or any of the long transport problems.

I appreciate the opportunity to express these opinions today. Thank you.

Senator DURENBERGER. I appreciate that, and the example in particular.

Wayne?

Mr. CROPP. Thank you, Mr. Chairman.

Before I begin, I would like to take this opportunity to express my appreciation to Senator Sasser for his kind welcome which you issued in his behalf, and his role in my invitation today.

My name is J. Wayne Cropp and I am the director of the Chattanooga-Hamilton County Air Pollution Control Bureau. I am also vice president of the Association of Local Air Pollution Control Officials and serve as cochairman of that association's clean air act review committee.

Included with this statement is a copy of ALAPCO's positions on the Clean Air Act.¹ In fact, we are most interested in showing you our position on the SIP process. I appreciate having been extended the opportunity to address the subcommittee's oversight hearing on intergovernmental relationships with regard to the control of air pollution.

As you know, the major Federal legislation in this area is the Clean Air Act. As an attorney, I am firmly convinced that no other Federal legislation exists which so closely and uniquely ties local, State, and Federal governments together to accomplish a unified goal. It is this relationship which I would like to discuss today.

Local programs believe that tremendous improvements in air quality have been achieved under the Clean Air Act. Indeed, my hometown of Chattanooga is an excellent example of a city where just such improvements have occurred. Local programs across the country wholeheartedly support the reauthorization of the Clean Air Act. This is not to say, however, that every provision of the Clean Air Act works to its greatest potential.

One of the areas which is in need of careful review and revision is the relationships that exist under the act. The development of the local-State-Federal partnership in air pollution control has been one of transition. The past two decades have seen the authority and emphasis in air pollution control shift from the most basic levels of

¹See p. 90.

government, that of the cities and counties, to State government and now finally to the Federal Government under the U.S. Environmental Protection Agency.

Local programs see two fundamental problems with the relationships which now exist between the Federal Government, on one hand, and State and local programs on the other.

First, we believe that the shift in the authority and decisionmaking process, which I mentioned earlier, has gone too far in the direction of the Federal Government while the State and local programs have continued to bear the responsibility of the air clean-up effort, vis-a-vis again the sanctions which we talked about.

Congress has found, and so stated in section 101(a)(3) of the Clean Air Act, that " * * * the prevention and control of air pollution at its source is the primary responsibility of States and local governments * * *." With these responsibilities should go the authority and ability to accomplish clean air goals in a manner most consistent with local needs, given that those local desires do not conflict with the needs of other areas.

The congressionally assigned Federal role in air pollution control has been, and should continue to be, one of establishing national ambient air quality standards; conducting research; providing technical and financial assistance to State and local governments; and conducting training in air pollution prevention and control. What is not appropriate, however, is that the authority for choosing the mix of options which are available, to achieve the national ambient air quality standards should lie with the Federal Government. Yet, we believe this is what has happened with EPA using its review of State programs as a means of interjecting itself into even the most trivial of decisions.

Most States and many local governments have proved their desire to protect public health and welfare by carrying out an effective air control effort. If, however, all program elements are going to be mandated by EPA, with the responsibilities for those programs resting only on States and locals, then Congress will find that the State and local governmental leaders will abandon their efforts. Prime examples of this are Mobile, Ala., and the State of Idaho, which you mentioned earlier today.

The abandonment of local and State efforts will be tragic because:

(a) The control effort will lose millions of dollars dedicated to protecting public health and welfare.

(b) The control effort will have to be run by the Federal Government which cannot, in our opinion, accomplish the same tasks in as economically effective manner.

(c) Perhaps most importantly, Congress will lose the assistance and cooperation of those who are most interested in, and impacted by, air quality in their vicinity.

The second fundamental difficulty with the local-State-Federal relationship is a problem with the very mechanism of the partnership arrangement. It interlocks with the first problem of authority we talked about. The issue to which I am now speaking is the matter of the State implementation plan [SIP] process.

Local programs support Federal enforcement of air pollution control regulations where local or State governments are not able to, or fail to, carry out their responsibilities. However, the SIP process, as

it now exists, requires that every regulatory revision must be approved by EPA. The SIP process additionally requires separate and duplicative public notice and comment periods at the State and Federal levels. Finally, the SIP process requires many multitiered reviews—up to 16 levels of internal review—within EPA. These reviews may require up to 2 years for Federal approval. The current SIP process is bureaucracy at its worst, a nightmare to attempt to manage. It requires mountains of administrative work for both EPA and the local or State governmental body submitting the SIP, while returning little or absolutely no actual air quality benefits for the manpower and financial investment required.

Local programs have called for a revision of the SIP process in their position paper on the Clean Air Act. We would urge you to support revisions of the act consistent with our recommendations.

Thank you.

Senator DURENBERGER. Thank you very much.

Wayne, you suggested that if the Federal Government becomes too heavyhanded, State and local governments might opt out of the air pollution control program, despite the threat of Federal sanctions. One issue we haven't raised in this regard this afternoon is voiced by this question: Would it be more appropriate for the Federal Government to regulate air pollution directly and not deal with the local governments?

Mr. CROFF. I don't believe so. I believe, as a basic personal philosophy, that we should govern from that form of government closest to the people. We should attempt to resolve those local problems which can be resolved locally.

We talked about long-range transport and the need of the Federal Government to work and legislate in the long-range transport area. There are a lot of local air pollution problems that I do not believe can best be handled by the Federal Government. I think we are best at handling those things. In fact, I think we can probably do it more efficiency and effectively, with the best value for the dollar. If that is the case, in these days of economic problems and shrinking economics, I think those responsibilities ought to be left to the States and locals.

Senator DURENBERGER. Can I assume the other two witnesses agree with that?

Mr. OFFUTT. Yes.

Mr. ROCKENSTEIN. Yes, Senator. I just offer the example from Minnesota, and particularly Minneapolis, that at the very beginning it looked like EPA was going to tell us exactly what to do. They came in with a complete transportation control plan for the city of Minneapolis before I was on the council. Essentially, if we had been forced to implement that plan on the timetable they proposed, it probably would have bankrupted two of this city's major funds by about 1978. They had no concept of the financial capability of the city in relation to the plan they proposed.

It is the National League of Cities' policy that, while we need Federal standards, implementation should be flexibly left up to State and local governments, with those two creating the enforcement and the implementation partnership at the local level.

Senator DURENBERGER. You brought up the issue of uniform and consistent enforcement. Do you have any idea of the degree to which

we can go with discretion to State and local governments and still end up with consistent enforcement all over the country?

Mr. ROCKENSTEIN. I think that the consistency of enforcement comes back to the question of "Do you meet the deadlines." For the League that is the critical issue. Again, if the deadlines are going to be met, then the flexibility of what enforcement measures you use should be left to the State. If the EPA finds, in one of the audits we are proposing, that deadlines are not going to be met, then I think you come back to the question of the EPA taking its own enforcement actions, or leveling other sanctions appropriate to the Clean Air Act or appropriate to the reduction of the problems in the air quality at the State and local level.

It is also a League position that it is not a good idea to cut off water construction grants under the concept that somehow it will improve both air and water quality. We talk about appropriate sanctions, not inappropriate sanctions which gut other programs without doing much, in some cases, for the one you are trying to start again.

Senator DURENBERGER. A thought occurred to me when I read the article on Idaho. Which of Idaho's federally granted moneys were going to be used to enforce the EPA mandates or the EPA plan for Idaho?

Let me get to one other issue which occurred to me when Bob talked about the Kentucky-Indiana problem. You will recall in my opening statement I premised what we are doing here on the problems of interstate commerce and, more particularly, the impact on business and economic development and the competition that results.

If we go along with the recommendations that we have heard from the panel today, and that we have read about in Henry Waxman's version of what EPA and the administration are up to, and we start turning back more reliance to the States, I am wondering the degree to which we run into fiscal disparity problems within a State. Most local governments are more heavily dependent on property taxes. The income taxes are reserved for State governments, at least in those States that don't have energy minerals to tax.

Maybe, Mr. Rockenstein, you can start off by talking a little bit about the Minneapolis situation. I would be interested in Chattanooga and Kentucky, also. What kinds of potential problems do we run into when we rely heavily on State and local standards or enforcement of standards in this whole business of competition, say, between major metropolitan areas and their suburbs, or between cities which are somewhat proximate to each other? Does it argue for some particular form of relationship between State and local government or, perhaps, through a regional approach within a State to solve some of these problems?

I would appreciate it if each of you would just take off on that subject and provide us with some assurance that we can take your advice and find that we are not in a throwback situation.

Mr. ROCKENSTEIN. Let me begin again, Senator, from the standpoint of National League policy. The League's policy on the partnership of State and local governments is that the relationship should be one of consultation and consensus. The first thing we have to say here is that that is one of the reasons, the strong reasons, we wish to have an appeal mechanism.

We believe that the thing which makes consultation and consensus work is that if the State fails to deal with you as a local government, you have the right to go to EPA and force it to happen. If Mayor David Shepherd of Oak Park, Mich., were here, he would tell you of the numerous times cities have gone to EPA region V to force cooperation with their own department of, I believe, natural resources in Michigan. In Minnesota we have not had the same kind of problem. We have had a cooperative relationship. There has been consultation with local-elected officials directly on the plan.

Yes, turning to a personal view now, there is certainly some potential for increasing the problem of fiscal disparities. I would suggest that that needs to be dealt with by another piece of crosscutting legislation at the national level, something like our Local Fiscal Disparities Act in Minnesota. That is the way you come at the problem, not by changing the local regulation.

I think there is another key point which the League would like to make, returning to League policy. That is on the question Senator Danforth posed—I wish he were here—of how you decide who gets in the field in the first place and who takes what part of the field.

We would like to suggest that too often that decision gets made at the Federal level without the kind of consultation and consensus with both State and local governments we would like to see. Let me give one example.

Mr. Danforth has a proposal on the problem of interstate transport of hazardous goods. That proposal, basically, is to move in and immediately preempt the field. Well, we have some questions which we think can be settled in a better forum than for you to move in with the legislation. Who has the enforcement capability once the Federal Government preempts? Who is going to do the enforcement? Are you going to preempt and leave us to enforce? Where is the emergency response capability? Some cities are saying "Go around us," not because they don't want the hazardous waste to come through but because they know, if there is an accident, they have no capability to respond to that emergency with their local fire and police. How about prenotification of shipment? How about alternative routing?

I think the way to start on that kind of issue is to put together an intergovernmental commission made up of Federal, State, and local officials to sort out which role goes to which level of government.

In sorting out those issues, I think we can then come to the legislative table—if you will—with a much better sense of who is going to get what responsibilities, how much it is going to cost, and which level of government is going to bear the cost than if you simply step in and preempt the field at the Federal level.

Speaking from National League policy, those are the two points we would make, particularly on consultation and consensus. We think the proper approach to sorting out the roles is at the very beginning.

Senator DURENBERGER. Thank you. Bob?

Mr. OFFUTT. We are a little bit more unique in Louisville. We sit on the EPA regional boundary. Region V is on one side of the river and region IV is on the other side of the river. Their approach to the implementation of the national policies is entirely different. So we get two different interpretations on the two sides of the river. This has caused a lot of our problems in Louisville.

Since we began implementing the 1970 act, Louisville has not had a new industry come into the area. We have lost a number of industries. When you lose one, regardless of size, you lose those jobs. They are gone. You can't hardly replace them. As I said before, this is significant to a metropolitan area. You already have suburban flight taking place. So I think the consistency bit, all the way through to interstate aspects of it, are going to be difficult for us.

Senator DURENBERGER. Thank you. Wayne?

Mr. CROPP. Let me begin by saying first of all that ALAPCO has supported the establishment of national primary and secondary air quality standards. Many urban areas, including Chattanooga, Louisville, and others such as the Twin Cities, have exceeded those national ambient air quality standards in the past.

It has been our job as local program directors, working with the cities, to fashion a remedy to the best of our ability to solve that air quality problem, and yet to do so in a manner which will not unduly burden the local government and the viability of the community as it exists.

I do not see a problem with the standards established by—I say standards but I am really talking more about emission limitations—fashioning something within the boundaries established by the national standards itself for economic competition, and so on. What we have been doing, to date, is trying to find the best mix of controls possible which will bring air quality down to healthy levels. We haven't had the opportunity to establish limitations that would allow a great deal of competition in one area, or a great deal of growth in one area, as opposed to another area. We have just been trying to get down below the standards at this time.

We think that can best be accomplished by local and State programs, rather than, say, the Federal Government; because it is the economic neck, if you will, of the city or county that must balance the interests of air quality and industrial growth.

Senator DURENBERGER. Thank you.

One last question for any one of you or all three of you. One major goal of the Clean Air Act is to force development of air pollution control technology. How, in your opinion, can EPA force acceptance of improved technologies while adapting to the call from State and local governments for diversity in meeting emission requirements?

Mr. ROCKENSTEIN. Mr. Chairman, I will dig into that because I think we have done some of that in Minnesota.

The most important role—and I believe it was identified in one of the earlier papers today—where the Federal Government can be of assistance is simply documenting, staying on top of, and making available to, local governments the state of the art in technology. That is one of the things very hard for, particularly, a local government which is trying to run a pollution control program. I think it is hard even for States—to stay on top of the status of national technology.

If that is done well, then local governments will have the opportunity to negotiate individual permitting processes or permits with groups of industry to facilitate good technology and good trade-offs which will meet the standards and yet provide the air quality we want. I think that offers us one good way of doing that.

I will turn to one of the two experts on either side of me for the more technical aspects of that.

Mr. OFFUTT. Innovative technology will come along fairly readily if the flexibility is allowed in the local and State programs. If you have good communications, a good partnership arrangement, between the Federal, State, and the local governments, and you expand that on over into the rest of your community—business and government—then innovation can come out of a system like that, when people know what each other is doing and understand the position of the other.

We have been able to try a number of programs like that. We pioneered the scrubber technology. We were the ones to try a mixed-zoning approach to land use. We have done a number of things like that.

But if this partnership is strained, the flexibility is not there, and you have problems of equity constantly arising, innovation will be cut off in a hurry.

Mr. CROPP. What the association really has called for is a clearing-house to be run by EPA on technology; and then, as well, for EPA to establish—as they have in the past—the new source performance standards (NSPS) which would be a bottom floor for technology determinations. Local or State programs could not make a less stringent determination. NSPS would be as lenient as they could go. If they wanted to make standards tighter, that would be totally possible.

The trade-off there is that if the standards are not as tight as necessary, and you have national ambient air quality standards in existence, then local areas will not be able to attract other business growth later on because that available increment of growth will have been consumed by the one industry. So that, in itself, forces tight determinations by local and State programs.

Senator DURENBERGER. Thank you all very much for your testimony. We appreciate it a great deal.

[The prepared statements of Messrs. Rockenstein and Offutt, and an attachment to the testimony of Mr. Cropp follow:]



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STATEMENT BY

THE HONORABLE WALTER ROCKENSTEIN
ALDERMAN, MINNEAPOLIS, MINNESOTA

ON BEHALF OF

THE NATIONAL LEAGUE OF CITIES

ON

THE CLEAN AIR ACT: INTERGOVERNMENTAL RELATIONSHIPS

BEFORE THE

SUBCOMMITTEE ON INTERGOVERNMENTAL RELATIONS

COMMITTEE ON GOVERNMENTAL AFFAIRS

JULY 22, 1981

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MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I AM WALTER ROCKENSTEIN, AN ALDERMAN ELECTED BY THE RESIDENTS OF THE ELEVENTH WARD IN MINNEAPOLIS, MINNESOTA. I AM TESTIFYING TODAY ON BEHALF OF THE NATIONAL LEAGUE OF CITIES. THE LEAGUE'S MEMBERSHIP IS COMPRISED OF SOME 15,000 DIRECT AND INDIRECT MEMBER CITIES, RANGING IN SIZE FROM ST. LOUIS AND ATLANTA TO SMITHVILLE, MISSOURI, AND ALCOA, TENNESSEE.

IT IS AN HONOR TO BE HERE THIS AFTERNOON TO ADDRESS THE INTERGOVERNMENTAL RELATIONSHIPS ESTABLISHED IN THE CLEAN AIR ACT. NLC BELIEVES THAT THE ROLES AND RESPONSIBILITIES OF EACH LEVEL OF GOVERNMENT PROVIDE THE FOUNDATION FOR ACHIEVING CLEAN AIR GOALS. WE APPRECIATE THE OPPORTUNITY YOU HAVE PROVIDED US TO SPEAK DIRECTLY TO THIS VITAL ISSUE.

I WOULD LIKE TO FIRST SUMMARIZE NLC'S GENERAL POSITION ON THE CLEAN AIR ACT AND THEN ADDRESS SPECIFIC FEDERAL, STATE, AND LOCAL RESPONSIBILITIES.

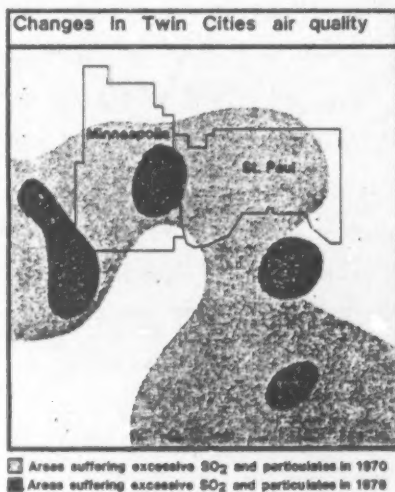
BACKGROUND

PROTECTION OF PUBLIC HEALTH AND ENCOURAGEMENT OF LOCAL ECONOMIC STABILITY AND GROWTH ARE TWO OF THE HIGHEST PRIORITIES OF THE NATIONAL LEAGUE OF CITIES. THE NEED TO BALANCE THESE TWO PRIORITIES AND NLC'S CONCERN THAT THE PROTECTION OF ONE NOT DIMINISH THE OTHER GUIDE OUR POSITION ON REAUTHORIZATION OF THE CLEAN AIR ACT.

THE NATIONAL LEAGUE OF CITIES AGREES WITH THE CONCLUSION OF THE NATIONAL COMMISSION ON AIR QUALITY THAT THE STRUCTURE OF THE ACT IS SOUND AND DOES NOT NEED FUNDAMENTAL CHANGES. THERE CAN BE NO QUESTION THAT THE CLEAN AIR ACT HAS RESULTED IN SIGNIFICANT IMPROVEMENTS IN AIR QUALITY AND PUBLIC HEALTH. THE ACCOMPANYING MAP OF THE TWIN CITIES SHOWS ONE IMPORTANT BENEFIT IN OUR METROPOLITAN AREA.

THE LIGHT SHADING REPRESENTS PORTIONS OF THE METROPOLITAN AREA THAT IN 1970 SUFFERED UNHEALTHY LEVELS OF SULFUR DIOXIDE AND SUSPENDED PARTICULATES. YOUNG CHILDREN, THE ILL, AND OLDER PEOPLE ARE ESPECIALLY SUSCEPTIBLE TO SUCH POLLUTANTS. IN 1970 THE AFFECTED AREA CONTAINED 140 ELEMENTARY AND JUNIOR HIGH SCHOOLS, 12 HOSPITALS, 57 LONG-TERM CARE FACILITIES, AND TWO CONVALESCENT AND NURSING-CARE FACILITIES.

BY 1979 THE AFFECTED AREAS HAD SHRUNK TO THE FOUR DARKER-SHADED AREAS. WITHIN THOSE FOUR SMALL AREAS WERE 31 ELEMENTARY AND JUNIOR HIGH SCHOOLS, FOUR HOSPITALS AND FIVE LONG-TERM CARE FACILITIES--A SIGNIFICANT IMPROVEMENT FROM THE SITUATION IN 1970.



PASSAGE OF THE ACT ALSO CONTRIBUTED TO THE ECONOMIC VITALITY OF THE NATION'S CITIES. THE IMPROVEMENT IN AIR QUALITY IN OUR MAJOR URBAN AREAS HAS MADE THESE CITIES MORE ATTRACTIVE PLACES TO LIVE AND WORK AND THE GROWTH OF THE NEW AIR POLLUTION CONTROL INDUSTRY HAS ADDED JOBS IN MANY CITIES.

ALTHOUGH THE COSTS OF COMPLIANCE ARE OFTEN HIGH, THE LEAGUE KNOWS THIS COST CANNOT BE AVOIDED--EITHER TODAY AS AN INVESTMENT IN COMPLIANCE TO PROTECT THE HEALTH OF OUR CONSTITUENTS AND THE VITALITY OF OUR COMMUNITIES, OR IN THE FUTURE AS DIRTY AIR CAUSES BURGEONING HEALTH COSTS AND FORCES RESCUE MISSION TO REVITALIZE DISTRESSED CITIES.

LET ME TURN NOW TO THE LEAGUE'S POSITION ON SPECIFIC ISSUES OF CONCERN TO THIS COMMITTEE.

INTERGOVERNMENTAL RELATIONSHIPS

MR. CHAIRMAN, YOU ASKED US TO ADDRESS THE APPROPRIATE BALANCE BETWEEN NATIONAL UNIFORMITY AND STATE AND LOCAL DISCRETION. NLC BELIEVES THIS MUST BE OF CENTRAL CONCERN WHEN AMENDING THE CLEAN AIR ACT. THUS, IN DEVELOPING NLC POLICY, CITY OFFICIALS ARE CONSTANTLY MINDFUL OF MAINTAINING THE CRITICAL BALANCE BETWEEN NATIONAL CONSISTENCY AND STATE AND LOCAL GOVERNMENT DISCRETION.

FIRST, THE FEDERAL ROLE. ALTHOUGH STATES AND LOCAL GOVERNMENTS HAVE THE PRIMARY RESPONSIBILITY FOR PROTECTING PUBLIC HEALTH AND SAFETY, THE FEDERAL GOVERNMENT PLAYS AN ESSENTIAL ROLE IN ASSURING CLEAN AIR. NATIONAL STANDARDS AND CONSISTENT ENFORCEMENT PROVIDE THE FRAMEWORK FOR ATTAINING CLEAN AIR AND PREVENTING DETERIORATION. NLC SUPPORTS MAINTAINING THESE PROVISIONS IN ORDER TO MINIMIZE

INTERSTATE CONFLICT AND COMPETITION.

WITHOUT UNIFORM AND ENFORCEABLE NATIONAL CLEAN AIR STANDARDS, STATES AND LOCAL GOVERNMENTS WOULD BE TEMPTED OR FORCED TO REDUCE LOCAL AIR POLLUTION STANDARDS TO ATTRACT NEW INDUSTRIAL DEVELOPMENT. WITHOUT SUCH STANDARDS, DISTRESSED AREAS WOULD HAVE LITTLE ALTERNATIVE BUT TO SEEK THE SHORT-TERM PROMISE OF ECONOMIC DEVELOPMENT BY COMPROMISING THE LONG-TERM PUBLIC HEALTH OF THE COMMUNITY. ONLY A NATIONAL STANDARD - SUCH AS THAT CREATED IN THE PRESENT CLEAN AIR ACT WHERE EACH AREA MUST MEET THE SAME GOAL WITH DELIBERATE SPEED - ENSURES THAT LONG-TERM NATIONAL HEALTH INTERESTS WILL NOT BE TRADED AWAY IN THE DAY-TO-DAY COMPETITION FOR COMMUNITY ECONOMIC DEVELOPMENT.

NLC CONTINUES TO SUPPORT FEDERALLY-DETERMINED DEADLINES TO ASSURE PROGRESS TOWARD ATTAINMENT. SOME AREAS WILL NOT BE ABLE TO MEET EVEN EXTENDED DEADLINES. HOWEVER, A WAIVER SHOULD BE GRANTED ONLY IF AN AREA HAS MADE A GOOD FAITH EFFORT TO IMPLEMENT ALL REASONABLE STRATEGIES DURING THE PERIOD PRIOR TO THE REQUEST. THIS SHOULD INCLUDE TRANSPORTATION CONTROL MEASURES AND STRICT EMISSION CONTROL REQUIREMENTS ON ALL NEW MAJOR SOURCES. A CITY OR STATE WILL HAVE LITTLE INCENTIVE TO PROCEED EXPEDITIOUSLY IF WAIVERS ARE EASILY OBTAINED. DEADLINES WILL HAVE LITTLE CREDIBILITY IF THEY ARE CHANGED OR REMOVED FOR THE CONVENIENCE OF THOSE WHO DO NOT COMPLY.

FOR THE SAME REASONS THE NATIONAL LEAGUE OF CITIES SUPPORTS SANCTIONS. SANCTIONS PROVIDE THE TEETH TO ENFORCE DEADLINES. HOWEVER, THE ENVIRONMENTAL PROTECTION AGENCY SHOULD BE GIVEN GREATER DISCRETION TO IMPOSE A MORE GRADUATED SET OF SANCTIONS, SO THAT THE PENALTIES IMPOSED MAY BE TAILORED TO THE SPECIFIC VIOLATION COMMITTED. THE SEVERITY OF THE EXISTING SANCTIONS HAVE MADE THEIR APPLICATION TO FIRST-TIME VIOLATIONS RARE.

NEW CAR EMISSION STANDARDS ARE CLEARLY A FEDERAL RESPONSIBILITY, AS ARE STRICT EMISSION CONTROL REQUIREMENTS ON ALL NEW MAJOR SOURCES. THE ONLY EFFECTIVE WAY TO CONTROL EMISSIONS IS AT THE SOURCE. THERE IS LITTLE THAT A STATE OR LOCAL GOVERNMENT CAN DO TO CONTROL POLLUTION ONCE POLLUTANTS ARE IN THE AIR. RELAXATION OF THESE PROVISIONS WILL CREATE PRESSURE TO EXTEND THE DEADLINES, SERIOUSLY DELAYING COMPLIANCE AND ENDANGERING PUBLIC HEALTH.

SECOND. STATE AND LOCAL DISCRETION. STATE AND LOCAL DISCRETION SHOULD INCLUDE BOTH THE DESIGN AND IMPLEMENTATION OF AIR QUALITY PROGRAMS WITHIN THE FRAMEWORK OF FEDERAL STANDARDS, DEADLINES, AND TECHNOLOGY REQUIREMENTS. A PERIODIC AUDIT OF A STATE'S PROGRESS BY EPA, RATHER THAN DAY-TO-DAY INVOLVEMENT IN EACH PERMITTING DECISION OR CONTROL PLAN, WILL STREAMLINE THE ADMINISTRATION OF THE ACT. THIS WILL REQUIRE A CHANGE IN THE STATE IMPLEMENTATION PLAN PROCESS.

VIRTUALLY EACH MODIFICATION IN A STATE IMPLEMENTATION PLAN, NO MATTER HOW MINOR, REQUIRES A COMPLETE PLAN REVISION. THIS ENTAILS PUBLIC HEARINGS AND OTHER FEDERAL ADMINISTRATIVE PROCEDURES WHICH ARE EXTREMELY TIME-CONSUMING AND DUPLICATIVE OF STATE AND LOCAL EFFORTS. WHILE THIS LENGTHY REVISION PROCESS WINDS ON, EVERY STATE AND LOCAL AIR POLLUTION REGULATION AND PERMIT HANGS IN A STATE OF LEGAL UNCERTAINTY FOR MONTHS OR YEARS. THIS HAS A CHILLING EFFECT ON INDUSTRIAL EXPANSION AND ON INNOVATIVE POLLUTION CONTROL EFFORTS.

THE NATIONAL LEAGUE OF CITIES RECOMMENDS AN IMPROVED APPROACH TO THE FEDERAL-STATE PARTNERSHIP ON IMPLEMENTATION OF THE CLEAN AIR ACT.

A) STATE IMPLEMENTATION PLANS WRITTEN BY STATE AND LOCAL GOVERNMENTS AND APPROVED BY THE ENVIRONMENTAL PROTECTION AGENCY SHOULD BE GENERIC IN NATURE. SUCH A GENERIC PLAN WOULD INCLUDE AGREEMENTS ON MEASUREMENT METHODOLOGY, SCHEDULES FOR MEETING DEADLINES, THE GENERAL SCOPE OF STATE REGULATIONS AND ENFORCEMENT PROGRAMS, AND THE GENERAL PROVISIONS OF STATE AND LOCAL PERMITTING AND TRANSPORTATION CONTROL PROGRAMS. STATES AND LOCAL GOVERNMENTS SHOULD THEN BE PERMITTED TO MAKE NEEDED CHANGES IN THEIR REGULATIONS, ENFORCEMENT PROGRAMS, PERMITTING PROCESSES, AND THEIR PARTICULAR MIX OF TRANSPORTATION CONTROLS WITHOUT REQUIRING A FEDERALLY-APPROVED AMENDMENT TO THE STATE IMPLEMENTATION PLAN. COMPLIANCE WITH THE GENERAL PROVISIONS OF THE PLAN, INCLUDING DEADLINES, WOULD STILL BE REQUIRED.

B) TWO MEASURES SHOULD BE USED TO ASSURE THAT THIS NEW FLEXIBILITY DOES NOT RESULT IN STATE AND LOCAL GOVERNMENTS FALLING BEHIND IN MEETING COMPLIANCE DEADLINES. THE ENVIRONMENTAL PROTECTION AGENCY SHOULD PERIODICALLY AUDIT STATE AND LOCAL GOVERNMENT PERFORMANCE TO ENSURE THAT PERMITS ISSUED, PROGRAMS EXECUTED, AND ENFORCEMENT ACTIONS UNDERTAKEN COMPLY WITH THE STATE IMPLEMENTATION PLAN. ALSO, AN APPEAL MECHANISM SHOULD BE ESTABLISHED WITHIN THE ENVIRONMENTAL PROTECTION AGENCY, PERMITTING THOSE WHO DISAGREE WITH A SPECIFIC STATE IMPLEMENTATION PLAN CHANGE OR THE TERMS OF AN OPERATING PERMIT TO RAISE THE ISSUE BEFORE THE AGENCY.

THE LEAGUE BELIEVES THESE CHANGES WOULD ENABLE STATES AND LOCAL GOVERNMENTS TO IMPLEMENT AIR PREVENTION AND CONTROL PROGRAMS MORE EASILY, WHILE AT THE SAME TIME REDUCING THE ADMINISTRATIVE BURDEN NOW ON THE ENVIRONMENTAL PROTECTION AGENCY.

THIRD, INTERSTATE TRANSPORT. THE TRANSPORT OF POLLUTION BETWEEN STATES, AS WELL AS BETWEEN AREAS WITHIN INDIVIDUAL STATES, PRESENTS A MAJOR AIR QUALITY PROBLEM WHICH CURRENT CLEAN AIR ACT PROVISIONS ARE INADEQUATE TO REMEDY. THE NATIONAL COMMISSION ON AIR QUALITY FOUND SIGNIFICANT TRANSPORT PROBLEMS FOR A NUMBER OF AIR POLLUTANTS, PARTICULARLY THOSE RELATED TO AUTOMOBILES AND SULFUR DIOXIDE (SO_2). WE IN MINNESOTA, OF COURSE, ARE DEEPLY CONCERNED ABOUT THE IMPACT OF ACID RAIN ON THE THOUSANDS OF SENSITIVE LAKES IN THE NORTHERN PART OF OUR STATE.

AS A FIRST STEP IN DEALING WITH THIS COMPLEX PROBLEM, THE NATIONAL LEAGUE OF CITIES JOINS THE NATIONAL GOVERNORS ASSOCIATION IN ASKING CONGRESS TO ENACT A THREE-STEP PROCESS: (A) CONGRESS SHOULD DIRECT THE ENVIRONMENTAL PROTECTION AGENCY TO DESIGNATE MAJOR POLLUTION TRANSPORT CORRIDORS. (B) CITIES AND STATES WITHIN EACH CORRIDOR WOULD THEN BE EMPOWERED TO NEGOTIATE THE NECESSARY EMISSION REDUCTIONS. (C) IF WITHIN A REASONABLE TIME SET FORTH BY STATUE, NO INTERSTAE AGREEMENTS WERE REACHED IN A GIVEN CORRIDOR, THE ENVIRONMENTAL PROTECTION AGENCY SHOULD BE EMPOWERED TO ACT ON THE TRANSPORT PROBLEM.

CONGRESS SHOULD ALSO KEEP IN MIND THAT A SWITCH FROM MANDATORY TO DISCRETIONARY INSPECTION AND MAINTENANCE, TECHNOLOGY STANDARDS, SECONDARY STANDARDS, ETC., WILL INCREASE INTERSTATE TRANSPORT OF POLLUTION AND EXACERBATE INTERSTATE CONFLICT. AIR POLLUTION DOES NOT RESPECT LOCAL, STATE, OR EVEN NATIONAL BOUNDARIES.

CONCLUSION

WE APPRECIATE THE OPPORTUNITY TO EXPRESS OUR CONCERNS TO YOU, MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE. THE NATIONAL LEAGUE OF CITIES STRONGLY SUPPORTS A COOPERATIVE FEDERAL, STATE, AND LOCAL EFFORT IN THE PREVENTION AND CONTROL OF AIR POLLUTION. THE NATION'S CITIES TAKE SERIOUSLY THEIR RESPONSIBILITY IN THIS NATIONAL EFFORT. SINCE 1970 WE HAVE BEEN LEARNING HOW TO BETTER ACHIEVE THESE GOALS. WE HOPE THE IMPROVEMENTS TO THE ACT THAT THE LEAGUE HAS SUGGESTED TODAY WILL SAVE TIME AND COST WITHOUT SACRIFICING THE ATTAINMENT AND MAINTENANCE OF AIR QUALITY.

THANK YOU.

Statement of Robert T. Offutt
Air Pollution Control District
Of
Louisville and Jefferson County, Kentucky
Before The
Senate Subcommittee on Inter-governmental Relations

July 22, 1981

INTRODUCTION

My name is Robert T. Offutt. I am Secretary-Treasurer of the Air Pollution Control District of Louisville and Jefferson County, Kentucky. I am also a past president of the National Association of Local Air Pollution Control Officials. I will address my comments today to the Association's position on the roles of EPA and the states and local programs; and interstate disputes. Those views are shared by me and my agency in Louisville.

The National Association of Local Air Pollution Control Officials represents more than 220 local air pollution control programs in areas in which more than 90,000,000 people live. Many of these local programs were in existence not only before their counterpart at the state level, but long before there was any federal law on the subject. In fact, I cannot remember one local program that has been created in the last ten years. My own agency in Louisville began in 1945 in the City and expanded into a county-wide program in 1952. The expertise and value of local programs in the air quality planning process has been recognized by Congress in Section 110(c)(3) of the Clean Air Act.

I think that it is important to note that there is no requirement in federal law for local programs. Local air pollution control programs exist because of a grass roots concern among citizens for better air quality. Their concern and desire, which they have supported for years through local tax dollars, merit significant recognition in the Act.

In times when resources are scarce it is prudent for us to carefully define roles and eliminate costly and time consuming duplication.

There is a place, a significant place, for all levels of government in the clean air effort. However, if a true partnership is to exist between all levels of government, there must be a definition of roles which will lead to trust and mutual respect among all parties. The existing system, requiring duplicate and triplicate review, filled with second guesses and late hits has not fostered partnership, but rather delay, misunderstanding and sometimes bitterness among the various levels of government.

In Louisville we believe that a partnership between all levels of government is only the beginning points; the partnership must extend on into the citizen, business and industrial sectors of the community. Our belief in and efforts to foster such a partnership has allowed us to develop innovative approaches to air quality problems. Louisville has participated heavily in the development and implementation of sulfur dioxide scrubber technology; has experimented with the concept of emission density zoning; has integrated air quality into land use decisions; and, has been a recognized national leader in the area of regulatory reform (offset, bubble, banking and trading techniques). Innovation is quickly stifled when laws are very strictly construed or applied to deny local programs the right to seek solutions to problems which are indigenous to their locale. National policy must bend on these occasions to prevent inequitable consequences.

In developing and implementing policies to deal with clean and dirty air areas it is important to consider economic equities and realities. Under existing policies, older industrialized cities, which have been classified as nonattainment areas, face the prospect of losing existing industries as more stringent controls are placed upon them. While losing these companies, the policies make it virtually impossible to attract new industries and obtain federal approval for their location.

A continuation of the existing policy of penalization will result in the further dwindling of the tax base of major cities with industries and workers abandoning the cities.

We believe that the proper role of the U.S. EPA involves the performance of tasks that are beyond the scope of state and local programs. Examples of such appropriate tasks are presented here for consideration.

1. National Ambient Air Quality Standards

An appropriate role for the U.S. EPA is the setting of National Ambient Air Quality standards, both primary and secondary. State and local programs do not have adequate resources to be able to review existing literature and perform the type of research necessary in setting meaningful standards. More likely you could expect a hodge-podge of standards based upon even worse data and less peer review than exists today. The number of disputes between states and communities over the allocation and use of air rights would proliferate accordingly. Primary and secondary standards should be set by EPA on a national basis, and primary standards should be set without consideration of costs. The costs of attainment certainly cannot be ignored but are more appropriately considered in the methods of control and the attainment dates which should be addressed in State Implementation Plans.

2. Tracking Technology Development and Preparation of Documents Indicating the Range of Technology that is Available.

The development and adoption of appropriate SIPS depend upon adequate analysis of available technology. The technology documents that we have received to date do not provide options or define limitations that exist within certain technologies.

Large scale application of water based paints is much more applicable in areas with low humidity. You will find no such statement in existing technology documents, but EPA will admit this. It is also true that the present RACT, Reasonably Available Control Technology, documents require the application of paints that do not exist today. If paints that are defined as reasonably available do not exist today, how will EPA define the more stringent BACT (Best Available Control Technology) and LAER (Lowest Available Emission Rate) controls?

In actuality they, BACT & LAER, are being interpreted as being the same and therefore there is only one control option. That's fine for EPA since they are not negotiating the schedule for compliance on a case by case basis. If proper technology documents had been prepared and periodically updated we would be on much firmer ground and on a better track toward clean air.

3. Expeditious Approval of SIP's.

Nearly every state SIP rests somewhere in the twilight land of revisions under review, pending approval or conditional approval. EPA Region V alone has more than 200 SIP revisions in process. Obviously some of these revisions are merely formalities but many are significant changes with industrial sources hanging in balance. Turn around time on SIP approvals must be reduced to a reasonable period such as 90 days. Automatic approval of SIP revisions should occur if EPA fails to act in that period.

4. Federal Overview of SIP Preparation and Implementation is Essential.

SIP preparation and implementation is a proper function for state and local government, but without a strong federal presence in the development and implementation of SIP's, some state and local governments may not act in a responsible manner.

Each SIP must be developed in a manner to meet CAA requirements, but there must be an authority to assure that there is a balance among the states. Reasonable progress toward attainment standards must be demonstratable on a regular basis or the SIP is worthless. Only by a federal overview can some semblance of equitable progress be maintained.

5. Pollutant Transport and Interstate Disputes.

Recently there has been much debate concerning the transport of pollutants both nationally and internationally. We know and can accurately predict the short range transport of pollutants from one portion of a community to another or between neighboring communities. Evidence of longer range transport has recently become available. The Association believes that although we do not have a complete understanding of the complex reaction of meteorology and atmospheric chemistry there is sufficient evidence to merit reasonable controls in the near term. Additional control needs can be better quantified through future research efforts at the federal level. Since this phenomena requires controls that must be accepted and incorporated into SIP's by a number of states, the problem of interstate disputes cannot be ignored. Section 126 of the Act has been proven to be inadequate to deal with interstate disputes. Later in this statement I will explain the Louisville interstate dispute as an example of the failure of Section 126.

The proper role of state and local government in the clean air scheme is the preparation and implementation of plans for the attainment of NAAQS. In state SIP's the state should be allowed to elect the best fit technologies from both a practicality and cost viewpoint. Best fit technology demands flexibility and we believe that flexibility should be allowed as long as a strategy produces an air quality benefit.

Without consultation and cooperation between states there will continue to be disputes.

Most states and local programs have construction and operating permits and administrative variance procedures. If these source specific regulations and procedures have been approved by EPA, there is no need for EPA approval of each and every action taken under them. Selected case reviews by EPA in their overview role can audit state action and if they find that a state or local program is not performing properly, require that state or local program to take as much corrective action as merited by the extent of the deviation. I believe that state and local programs are conscientious and want to do a good job. Without this good faith effort, we would not have achieved as much improvement in air quality as we have. They should be treated accordingly.

The split of responsibilities under the Clean Air Act between the state and local programs should be delineated by the parties within the jurisdiction. Many local programs are given full SIP authority by their state. These actions must be accepted by EPA. Currently, EPA often requires local programs to operate under administrative delegations of authority from the state where the delegation of authority has already taken place in the legislature. All state laws, not inconsistent with the Act, must be recognized. Where there are inconsistencies in state law there must be adequate time allowed for the state to make revisions.

Local program responsibilities vary from community to community and state to state. Some local programs have high levels of expertise and funding and have been granted authority accordingly by the state. Many are smaller and the authority granted is not as sweeping. Regardless of program size, local government consultation in SIP preparation is vital. The odds of success are highest in any planning process when the level of consultation, accommodation and agreement are high. Since many SIP programs must be implemented at the local level without proper consultation those programs will be, at best, controversial.

Returning to the interstate dispute question, I would like to use the Louisville experience as an example of the problems to be encountered in applying §126.

The Jefferson County Air Pollution Control District was created pursuant to Kentucky Revised Statutes Chapter 77 and is a political subdivision of the Commonwealth of Kentucky (KRS 77.050).

The agency is a representative of the Jefferson County portion of the Louisville Interstate Air Quality Control Region (LIAQR) which also includes Floyd and Clark Counties in Indiana. LIAQR also is split between EPA's Region IV (which contains Jefferson County) and Region V (in which the Indiana counties are located). It is important to note that we are talking about one metropolitan area.

In 1972, modeling established that a 1.2 lbs/mm BTU per hour heat input limit would be required on both sides of the Ohio River in order to meet ambient air standards. Appropriate regulations were adopted by agreement between Kentucky and Indiana.

Industries within our jurisdiction then began a program to come into compliance with the new standard. Most notably, the Louisville Gas and Electric Company began installing scrubbers which have cost the utility nearly \$130 million. Other local industries switched to more expensive low sulfur coal.

During this period no apparent progress was made in the Indiana counties to meet the 1.2 lbs/mm BTU standard. On May 2, 1975, the EPA published notice in the Federal Register of the intent to disapprove a SIP revision that would change the allowable SO₂ limit to 6 lbs/mm BTU. This 6 lb. limitation means that no SO₂ controls are required when a source is burning Indiana or Kentucky coal.

More than a year later, on August 24, 1976, the EPA published notice that it was approving the SIP revision in Floyd County where the Gallagher Station Plant of Public Service Indiana is located in the same federally recognized metropolitan area.

In effect, EPA changed its mind -- without notifying Jefferson County -- and allowed Indiana to have a standard which is five times more lenient than ours.

The State of Indiana is amending its SIP, because of the 1977 amendments to the Clean Air Act, and purposes to keep the 6.0 lbs/mm BTU limit.

Air quality modeling performed by EPA Region IV indicates that sulfur dioxide emissions from the Gallagher Station Plant will interfere with the attainment and maintenance of the ambient SO₂ standard in Jefferson County, Kentucky. These data were pointed out to the Indiana State Board of Health, which is responsible for adopting the SIP, on April 25, 1979, at a public hearing in Indianapolis on their SIP.

These data were additionally supported by an "Analysis of the Impact upon Air Quality in Louisville, Kentucky from the Gallagher Steam Plant," submitted by Engineering-Science to EPA Region IV in October, 1979.

On May 14, 1979, the District requested Douglas Costle, Administrator of the EPA, to set a hearing to resolve the issue under provisions of Section 126 (b) of the Clean Air Act.

On October 25, 1979, Mr. Costle authorized the Regional Administrators of Regions IV and V to hold a hearing.

Because a hearing date was not set and no schedule for doing so could be determined, the District on December 20, 1979, informed Mr. Costle of its intention to file suit against him (Pursuant to Section 304 (a) (2)) for his failure to hold a hearing in a timely manner. Section 304 required that EPA be given 60 days notice from date of notice before a suit can be filed.

Finally, March 17, 1980, a federal register notice scheduled a hearing for April 17, 1980. There were three basic issues requiring resolution in hearing. They were:

1. Do emissions from the Gallagher plant impact on the District, thus preventing attainment or maintenance?

2. How should the economic and social burdens of attainment be distributed between the states?
3. How should future growth be distributed between the states?

At that hearing testimony was presented by parties representing both sides of the issue, and the matter was taken under advisement by the hearing panel.

On October 21, 1980, after twice the amount of time allowed under Section 126 of the Act, the District decided that the issue had dragged long enough and issued legal notice to the Administrator of its intent to sue for relief.

The action was filed December 31, 1980 in the U.S. District Court for the Western District of Kentucky. EPA did not contest the requested relief and on May 29, 1981, an order was signed by the judge requiring EPA to render a decision within 60 days. It is now July 22, 1981, and we have had no communication with EPA concerning a ruling. It appears that the issue may well return to court at the end of this month.

If under the present statutory scheme EPA cannot resolve interstate disputes involving one metropolitan area, where modeling is straight forward and emission rates are easily tracked, then §126 of the law is patently inadequate. The upcoming disputes concerning long range transport are bound to be even more difficult to decide. I strongly recommend that Section 126 be significantly revised in view of these problems.

I greatly appreciate the opportunity to be here today to express the views of ALAPCO and myself.

ATTACHMENT TO TESTIMONY OF J. WAYNE CROPP

THE ASSOCIATION OF LOCAL AIR POLLUTION CONTROL OFFICIALS

POSITIONS ON THE CLEAN AIR ACT

The Clean Air Act has proven to be worthy and effective legislation which has made laudable gains in achieving and protecting a valuable natural resource, clean air. The Association of Local Air Pollution Control Officials (ALAPCO) reaffirms its support for the goal of achieving and maintaining air quality which is protective of the nation's health and welfare values. ALAPCO strongly supports the reauthorization of the Clean Air Act.

The Association of Local Air Pollution Control Officials represents air pollution control programs in well over 100 major metropolitan areas across the continental United States. Local programs are responsible for protecting the health and welfare of over 94 million people from the hazards of air pollution.

Most of the nations's air pollution problems are in or near major metropolitan areas. Representatives from these areas constitute the majority of ALAPCO's membership. As members of ALAPCO, we believe that our positions on the Clean Air Act represent the best interests of communities across the nation. We are committed to achieving healthy air quality for all citizens.

While ALAPCO endorses the goals and objectives of the Clean Air Act (the Act), the implementation of the legislation can be improved through both administrative changes within

the U.S. Environmental Protection Agency (U.S. EPA), and legislative amendments to the Act. We believe that these revisions should clearly recognize that state and local governments have primary responsibility for the protection of public health and welfare. Our recommendations are made with the conviction that an effective air program can best be achieved through a strong national directive supported by the federal government, but implemented and enforced by state and local governments.

AMBIENT AIR QUALITY STANDARDS

The Clean Air Act, as amended, provides for the protection of the nation's health and welfare by mandating in Section 109 that the Administrator of the U.S. EPA prescribe national primary ambient air quality standards and national secondary ambient air quality standards.

ALAPCO favors and supports the concept of national health and welfare-based standards established by U.S. EPA, recognizing that the NAAQS are the very heart of the Clean Air Act.

The establishment of primary air quality standards should be strictly related to health concerns without consideration of costs or the ability of a given area to attain the air quality standards.

Secondary air quality standards should also be national in scope and established by U.S. EPA. Areas which are not attaining the secondary ambient air quality standards should be permitted a reasonable time to achieve compliance with these standards.

As now exists under federal law, state and local govern-

ments should be assured the option to adopt primary and secondary ambient air quality standards which are more stringent than the national goals in order to protect localized environmental, property or human values. However, ALAPCO opposes any recommendation that state and local governments be provided the authority to establish secondary standards in lieu of, or which would supersede the nation-wide goals. Our opposition is based primarily on the belief that state and local governments, at this time of budgetary reductions and restraint, do not have the necessary funding and support to conduct independent, valid studies which would be scientifically justifiable. If state and local governments are allowed to adopt secondary standards in lieu of uniform federal standards, severe equity problems could result.

ATTAINMENT DEADLINES

ALAPCO recommends that existing air quality attainment deadlines be extended. The membership believes that attainment deadlines established for the NAAQS have been unrealistic, since local officials have not had adequate time to develop effective State Implementation Plans (SIPs) and implement necessary controls to attain the standards within the statutory deadline of the Act. Moreover, monumental national efforts to assemble and review SIPs on a tight time schedule, without any recognition of the state and local requirements for approval, have led to plans which are in some instances unsupportable and merely demonstrate compliance "on paper." (See ALAPCO position on State Implementation Plans.)

It is the position of ALAPCO that the extended attainment

deadlines be established by statute, with provision that the U.S. EPA Administrator be granted the authority, after notice and opportunity for public hearing, to extend the deadline beyond this date on a case-by-case basis. Criteria used by the Administrator in considering extensions should also be specified in the Act. One such criterion would be a showing by the affected jurisdiction that it has made a "good faith effort" to implement all reasonable and available strategies during the period prior to the request for the extension.

If and when an extension is granted, the Administrator should be required to confer with state and local officials of the affected jurisdiction to identify the appropriate revised attainment deadline for the area. Once a new deadline is established, the Administrator, again after consulting with state and local officials, must identify suitable control measures for the affected jurisdiction and provide that the attainment status of the area be reviewed every year to insure reasonable progress is being made toward the extended deadline. If reasonable progress is not being made, additional controls should be required.

STATE IMPLEMENTATION PLANS

The current State Implementation Plan (SIP) concept mandated under Section 110 of the Clean Air Act, while promising to permit dual federal and state enforcement of air regulation, has developed into a cumbersome and burdensome process that continues to provide relatively smaller returns with each increasing demand that is placed upon the regulatory framework. While ALAPCO fully supports retention of the State Implementation

Plan concept, the association recommends that the Clean Air Act be amended in order to lighten the burden of the current process and to free the nation's governmental air protectors to expend energy in more fruitful endeavors.

The Clean Air Act, in Section 101(a)(3), recognizes that the prevention and control of air pollution at its source is the primary responsibility of state and local governments. However, the implementation plan process called for under Section 110 recognizes only the states' authority and responsibility to adopt and implement regulations, even though state law often grants local government this responsibility. The State Implementation Plan process has been established in spite of the fact that local air pollution control agencies are, in many instances, responsible for the basic elements of these plans (i.e., inventories, air monitoring, stack testing, model analysis, coordination with local elected officials and transportation/land use planning). ALAPCO recommends that Section 110 of the Act be amended to clarify and provide that local governmental bodies may adopt and implement individual implementation plans. These SIPs should be separate and apart from state review, where permitted by state law, in consonance with Section 101 of the Act.

ALAPCO has not yet taken a position on the concept of emission fees and certain other forms of market place control (i.e., marketable permits) as a means of air pollution regulation. We would note in passing that cities within ALAPCO's membership, such as Philadelphia, PA., have undertaken serious studies of the emission fee concept. The Clean Air Act, as currently

construed by U.S. EPA, would not, however, permit the implementation of such a concept on even a trial basis because of the limitation of Section 110(a)(2)(B) which provides that SIPs must contain "emission limitations." A fee system might not have source specific emission limitations that would meet the classical definition of the term. ALAPCO would therefore support some amendment to the Clean Air Act that permits the use of such innovative regulatory mechanisms on a trial basis in order to demonstrate whether the concept could have an effective application to the air control effort.

ALAPCO also recommends that economic sanctions and growth sanctions (i.e., permit moratoriums) not be required by the Act, for failure of state and local governments to:

(1) submit State Implementation Plans and revisions by established time-frames; or

(2) meet designated attainment deadlines, when such time-frames or deadlines have been unrealistic. ALAPCO suggests that Congress provide the Administrator of U.S. EPA with discretionary authority to impose these sanctions, so that appropriate factors may be weighed before the harsh restraints of loss of funding and retardation of economic development are invoked.

Lastly, in order to make the SIP process a more meaningful and effective tool, ALAPCO urges that the Act be amended as hereafter set forth. This recommendation, as modified, is consistent with certain recommendations of the State and Territorial Air Pollution Program Administrators (STAPPA)

as listed below:

(1) Clarify the distinction between the informational and the enforceable elements of the SIP. Provide for recognition of state and local laws and other legal requirements without their becoming federal rules;

(2) Modify the SIP revision process by giving recognition to state and local public participation and due process procedures which achieve the same ends as the federal Administrative Procedure Act procedures. Require U.S. EPA to participate formally in the state adoption process, and bind U.S. EPA to adhere to formal positions taken there unless new information or new legal requirements (such as a court ruling) dictate otherwise. Allow retroactive application of new policies only under extreme justification;

(3) Specifically provide that contact between state or local officials and U.S. EPA may be excluded from the ex parte prohibitions of the APA. (This may require an amendment to the APA, rather than the CAA);

(4) Provide that short-term variances can be granted by the states and locals if they meet certain substantive and procedural tests, without need for SIP approval. (See ALAPCO position on Enforcement);

(5) Provide for deadlines on U.S. EPA review and approval action, with provision that failure to act constitutes approval; and

(6) Accord federal recognition to state and local operating permits issued pursuant to rules and procedures contained in the SIP, making such permits federally enforceable, and thereby eliminating the need for individual site specific SIP revisions.

NEW SOURCE CONSTRUCTION AND REVIEW

The Clean Air Act should provide a concise and clear policy on construction of new sources. The current review process is confusing, time and manpower intensive, and in some instances excessively expensive for the proposed facility and the reviewing agency. Provisions on construction of new sources now run throughout at least three different sections of the Act without a central plan or process. The new source provisions of the NSPS, nonattainment and PSD sections may indeed overlap so that a new source may at some time theoret-

tically be required to meet the requirements of the three legislative provisions at one location. This lack of central new source planning has led to confusion in the siting and permitting requirements of new sources.

ALAPCO recommends that the new source construction provisions of the Act be integrated under one central concept so that the basic elements and definitions relative to new source construction and modification are consistent. Once this has been accomplished, efforts should be focused on establishing a streamlined permit review and analysis process that will assure protection of the traditional values upon which the separate concepts of NSPS, PSD and non-attainment construction permit requirements were adopted.

As discussed in the section on non-attainment areas (below), ALAPCO is vitally concerned that economic growth could become unnecessarily skewed toward rural clean air areas. ALAPCO favors strong and effective clean-up efforts in the nation's cities, but care must be taken to insure that the Clean Air Act does not cripple the ability of urban areas to compete for new industrial sources. This issue must be a major factor in the adoption of any new source policy.

ALAPCO wholeheartedly supports the basic tenets upon which the concepts of NSPS, PSD and the non-attainment provisions were founded. Inasmuch as these concepts are now fractionalized in the Act, our discussion of these topics will be treated separately. We believe that some of these changes are necessary to make the respective programs more manageable while maintaining or improving upon their effectiveness. Other changes are

recommended in order to equalize the new source review process, where possible, whether that source locates in an attainment or non-attainment area.

A. New Source Performance Standards (NSPS)

Past experience has demonstrated that U.S. EPA has been ineffective in promulgating NSPS emission limitations in a timely fashion. It is ALAPCO's position that NSPS limitations should become effective at the time of final promulgation; otherwise, sources and reviewing agencies are left in a "never-never land" of confusion over applicable emission limitations between the time of rule proposal and final promulgation. Some significant judicial burden should be placed upon challenging parties so that the effective date of final rules are not needlessly delayed by litigation. Making NSPS limitations effective upon the date of final promulgation would also provide an incentive for U.S. EPA to publish the final limits in a timely fashion.

ALAPCO recommends that new sources or major modifications be protected from retrofit requirements for a specified period of time, except where additional controls are necessary to achieve the requirements of newly designated criteria or hazardous pollutants. The NSPS limitations should be reviewed periodically on a basis established by Congress.

B. Prevention of Significant Deterioration (PSD)

It should be stated at the outset that the changes recommended in the PSD program are to be considered as a package. If this is done, then we believe that the changes we recommend will not weaken the present PSD provisions. To the contrary,

we believe that it will make them more effective.

ALAPCO recommends the elimination of the increment system in Class II and Class III areas. Properly adopted secondary NAAQS should be sufficient to protect the public welfare from any known or anticipated adverse effects associated with a particular pollutant. ALAPCO's position on elimination of the Class II and Class III increment system is contingent, however, upon retention of federal secondary NAAQS. Obviously, state and local governments should still maintain the authority to keep some type of incremental tracking system depending upon local desires.

ALAPCO also recommends the deletion of short-term increments in Class I areas if an otherwise appropriate tracking system can be identified and utilized. If no other viable tracking system is appropriate, then Class I short term increments should be retained.

ALAPCO is extremely concerned that distinctions between the PSD legislation and the permitting requirements for non-attainment areas (i.e., offset requirements) may lead to (1) the displacement of sources in urban areas to unclassified areas (for criteria pollutants), and (2) the inability of urban areas to effectively compete for new industry. Such displacement could contribute to already existing problems of urban sprawl and the further economic deterioration of inner-city urban areas. Unclassified areas located adjacent to non-attainment areas offer a particular attraction to new sources that are willing to draw upon an existing supply of capital, resources, manpower and transportation, without the concerns of urban

taxes and sophisticated government. It is ALAPCO's belief that many of the unclassified areas may indeed be non-attainment, particularly for transported pollutants. Therefore, ALAPCO recommends that pre-construction monitoring be required by the Act prior to the siting of new sources in unclassified areas. Otherwise monitoring and modelling requirements should be determined by state and local programs on a case-by-case basis.

ALAPCO recommends that the Best Available Control Technology (BACT) be applied to control any given pollutant at a new source which has the potential to emit (after control) 50 tons per year of that pollutant in PSD areas.

C. Non-attainment Areas

ALAPCO recommends that Best Available Control Technology be required in lieu of Lowest Achievable Emission Rate (LAER) for new sources locating in non-attainment areas. This requirement, which would apply to sources emitting (after control) greater than 50 tons per year of a given pollutant, is consistent with our concern over the potential the existing Act has for depriving metropolitan areas of new source growth.

Studies have shown that the air quality benefits from the application of BACT have been nearly identical to those achieved from LAER. Furthermore, requiring Best Available Control Technology in non-attainment areas will encourage technological development and increasingly tighter emission limitations as new sources are constructed. In addition, the technology-forcing aspects of offset requirements will be a driving force in improving and tightening the BACT limitations across the

country.

ALAPCO opposes any suggestion that Best Available Control Technology be equated with the established New Source Performance Standards. BACT determinations should be made on a case-by-case basis.

ALAPCO supports the retention of the offset requirement for major sources in all parts of non-attainment areas, including both rural and urban locations. ALAPCO does not support the use of a specialized fund for air quality improvements contributed by a new source which is unable to locate offsetting emissions.

ENFORCEMENT

Hand-in-hand with the difficulties experienced in the development of a State Implementation Plan are the problems experienced in the actual implementation of the SIP. There is an overwhelming consensus among the local air agencies that U.S. EPA has exceeded the original intent of its charter through its direct involvement within state programs and through independent enforcement activities. In many instances this intervention may needlessly supersede the activities of state and local programs. The regional offices of U.S. EPA have used the SIP process to become overly involved in the day-to-day activities of air pollution control.

ALAPCO recommends that Section 113 of the Clean Air Act be amended to clearly demonstrate that U.S. EPA's prime responsibility should be to act in an oversight or audit role relative to SIP enforcement. Dual jurisdiction should be retained, however, so that U.S. EPA can take enforcement action

where state and local programs either fail to act or are unable to act. The original intent of the Clean Air Act, as enunciated in Section 101, should be carried out with the recognition that the prevention and control of air pollution at its source is the primary responsibility of state and local governments. Federal financial assistance and leadership should act as the underpinnings of an effective enforcement effort.

Section 113 of the Clean Air Act should be additionally revised to clearly provide that state and local programs may issue administrative orders (i.e., variances) for up to a one year period of time, in order to allow a source to come into final compliance with a State Implementation Plan. Such an amendment would, in ALAPCO's understanding, be adopted without the mandatory requirement that noncompliance penalties be assessed for the period of time the order is in effect. The variance authority would also apply to the extension of interim compliance dates for sources where no extension of the final compliance dates would be necessary. It is envisioned that, as with the SIP recommendation above, a procedure could be established which, if followed by the state or local program, would be federally enforceable without requiring a site-specific SIP revision.

GRANTS FOR THE SUPPORT OF AIR POLLUTION PLANNING AND CONTROL PROGRAMS

Under the current structure of the Clean Air Act, and ALAPCO's recommendations as set forth in this document, Section 105 grant funding is essential to the economic viability of state and local air programs.

This same Section 105, however, may cause a number of

state and local air pollution agencies to face financial difficulties. The problem arises from the requirement of Section 105(b) which contains the Continuing Eligibility Limit provision. This section provides, in essence, that no agency shall receive any grant for an air pollution control program when its non-federal expenditures for such a program will be less than the non-federal expenditures for the preceding fiscal year, unless the reductions were non-selective reductions in expenditures of the programs of all executive branch agencies of the applicable unit of government.

The difficulty with this requirement is that local officials, generally responding to taxpayer demands, have reacted by reducing expenditures, usually by using selective methods (i.e., essential services such as police and fire are reduced to a lesser extent than other program areas). Such selective budgetary reductions may reduce the non-federal funding for air pollution control programs below the previous year's level and thus trigger the Section 105(b) stipulation. This again may result in air pollution control programs not being eligible for any federal funds under Section 105.

ALAPCO recommends that the requirement that a sustained level of non-federal funding be achieved in order to receive any federal funding be stricken from the Act, and that U.S. EPA be given discretionary authority to determine if the state or local entity is failing to adequately provide for the air pollution control effort.

Alternatively, it may be appropriate for the Clean Air Act to be amended in such a fashion as to be consistent with

Section 106(d) of the Federal Water Pollution Control Act, which relies upon a provision that non-federal expenditures must at least equal a base year established in the Water Pollution Control Act. This approach would give the state and local officials the flexibility to vary funding from year to year in response to established priorities, and yet permit U.S. EPA to insure that a substantial budget has been provided for the air control effort.

MOBILE SOURCES

There is unequivocal support among ALAPCO members for an effective control program over new moving sources. No other strategy for control of mobile source emissions provides reductions of hydrocarbons comparable to those obtained under the Federal Motor Vehicle Control Program (FMVCP).

Should new motor vehicle performance standards be relaxed, state and local officials would be faced with the unacceptable alternatives of either obtaining the lost hydrocarbon reductions from other mobile source strategies which are not as effective, or adopting more stringent point source emission requirements. Neither of these options provide the broad national uniform benefit comparable to that provided by the FMVCP.

Additionally, the FMVCP plays a significant role in reducing carbon monoxide emissions in those cities where this pollutant is a problem.

TRANSPORTATION PLANNING

It is ALAPCO's position that transportation planning efforts to date under Section 174 and 175 of the Clean Air Act have

been ineffective in producing significant new reductions. It is our opinion that these reductions would have been achieved without the mandate of this program. Generally, transportation planning has not lived up to its initial expectations. Those deficiencies have resulted from the fact that metropolitan planning organizations (MPO's) have maintained their primary allegiance to traditional transportation planning programs and agencies. Air quality planning required under the Act has often been just a federally mandated overlay to regular responsibilities, since Section 109(j) of the Federal Highway Act requires that transportation plans and programs at the local level must be consistent with the SIP.

ALAPCO favors removal of transportation planning as a requirement of the Clean Air Act. MPO's should still perform annual emission inventories of mobile sources, also taking into account any Transportation Control Measures (TCM's) which may have been implemented for reasons different than air quality improvement (such as energy conservation or congestion relief). The planning requirements for TCM analysis under highway and transit legislation should be emphasized and strengthened. The resultant reductions can still be accounted for in SIP development and tracking.

Any special work required above and beyond the normal transportation planning process should be fully funded through a procedure consistent with the Section 105 grant mechanism currently available to local and state programs.

INTERSTATE TRANSPORT

Long range transport of pollutants, including precursors

of both photochemical oxidants and acid deposition, cannot be adequately addressed by state and local governments under the existing structure of the Clean Air Act. ALAPCO recommends that the Federal role be strengthened through amendments to Sections 110(a)(2)(E) and 126 of the Act to insure equity. Moreover, since the ultimate responsibility for adopting and enforcing emission limits still rests with state and local agencies, it is necessary that resources be made available to assist in this effort.

With regard to acid deposition, ALAPCO recommends that actual reductions in sulfur oxide emissions be achieved in the near term, with further controls identified as additional research warrants.

HAZARDOUS POLLUTANTS

Hazardous pollutants represent a growing concern within our society, and yet federal efforts to promulgate standards have not been sufficient to address this air pollution problem. ALAPCO supports increased funding and legislative authority to place research and standard promulgation on an accelerated schedule.

TRAINING

ALAPCO is convinced that an effective training program for air pollution control personnel can best be accomplished through a national program conducted in regional areas. U.S. EPA must carry on a training program for its own personnel. These efforts need not be duplicated through separate state programs. ALAPCO recommends retention of federal training programs in which state and local programs may freely participate.

Senator DURENBERGER. This concludes our hearing. The hearing record will remain open for 1 week. Anyone wishing to elaborate on their remarks or provide statements for the record is encouraged to do so.

The hearing is now adjourned. Thank you.

[Whereupon, at 4:35 p.m., the subcommittee was recessed, to reconvene subject to the call of the chair.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

NATIONALIZING REGULATION: FOUR INTERGOVERNMENTAL MECHANISMS

(By Melvin J. Dubnick, Associate Professor, Department of Political Science, University of Kansas, and Alan R. Gitelson, Associate Professor, Department of Political Science, Loyola University of Chicago)

ABSTRACT

Nationalizing Regulation: Four Intergovernmental Mechanisms

The nationalization of regulatory policy is a major trend in American public policy which is having considerable impact on state and local governments. The delivery of these regulations can be carried out through a variety of means, but the most commonly used mechanisms are intergovernmental. This paper describes four types of intergovernmental mechanisms useful in the nationalization process: technical assistance, financial assistance, the assertion of preemptive capabilities, and legal conscription. Each is examined to determine its formal foundations, current examples of its application in regulatory policy efforts, and the conditions which might restrict or facilitate its future use. The paper ends by exploring the fiscal, political, and constitutional/legal implications of our increasing reliance on these delivery mechanisms for the implementation of national regulations.

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I. Introduction

As we enter the 1980s, state and local governments find themselves in the midst of a major institutional upheaval. They are at the center of one of the most significant legal, administrative, and political changes to challenge U.S. government officials in this century. They have not been revolutionary changes, but instead have arisen since World War II in the subtle, incremental fashion typical of modern American politics and policymaking. They are not changes in the internal structures, procedures, or personalities of specific government entities, but rather in relations among them. They are changes that not only challenge the legal autonomy and constitutional authority of state and local units, but also their fiscal resources and administrative capacities. Most of all, they are challenges to the fundamental roles which had evolved in the American federal system through the New Deal era.

To understand these changes and challenges, we must look to two simultaneous and closely related trends: the nationalization of American public policy and the increasing reliance on regulatory mechanisms by American policymakers. The nationalization of regulatory policy is a trend which took root during the middle 1960s and gained substantive form during the 1970s. Traceable back to the New Deal and the discovery of "national police powers,"¹ its immediate source is in Kennedy's New Frontier and Johnson's Great Society. During that period, the "positive national state and its programs" were accepted "as a positive virtue, as something desirable for its own sake and patently necessary for the society."² It manifested itself slowly at first, particularly as national efforts to protect the public health and safety, and to guarantee and extend civil rights. By the 1970s, national regulatory efforts were common in dealing with consumer protection, environmental deterioration, energy shortages and ever more frequent economic crises.

State and local governments were greatly affected by this trend, and in fact have become the principal vehicles through which this development has been manifested. This paper examines the roles played by state and local governments in the nationalization of regulatory policy and offers a classificatory scheme for understanding both the means and long-range costs of this trend. The following section reviews recent developments in regulatory policy and nationalization and their relationship to each other. This is followed by a survey of various means through which nationalization can be implemented, with specific attention given to four increasingly significant intergovernmental mechanisms. The implications of these developments are the subject of a final section.

II. The Nationalization "Trend"

Regulatory policies have received considerable attention in recent years, most of it critical. Speeches are made, studies conducted, symposia held, books and articles written, and specialized periodicals established as reflections of the increased status of government regulation on the public agenda. This is not the first time regulation has been a prominent political issue, nor it is likely to be the last. Nevertheless, the current interest in regulation remains strong and expansive. Several recent developments account for this growing awareness and concern.

First, there has been a significant and visible proliferation of both regulators and regulations. There are several indicators of this growth. One widely cited study noted that between 1970 and 1975 the number of "major" regulatory agencies increased from 20 to 27.³ Another study found 20 new federal regulatory agencies were created between 1970 and 1979, by far the greatest increase for any decade in American history.⁴

This proliferation of regulatory entities was complemented by growth in the number of regulatory laws and programs passed since the beginning of the 1970s. According to one count, there were 40 such federal enactments from 1970 through 1976.⁵ And if the number of pages devoted to regulations in the Federal Register and Code of Federal Regulations (CFR) can be regarded as a reliable indicator of the increased work generated by new and expanding regulatory bodies, one can only conclude that the growth in regulatory acts has been at least proportional to the growth in regulatory actors. For example, between 1970 and 1975 the number of pages in the Federal Register increased by 201 percent, while the CFR expanded by 33 percent.⁶ By the end of the decade the impact of this rapid growth pattern was being felt throughout society, and more media and scholarly attention was being devoted to this expanding sector of government activity.

A second and associated development was the distinctive nature of many of the "new" regulators and regulations. The most frequently cited difference between old and new regulations is that the latter tend to be "social" rather than "economic"; that is, they focus on the "conditions under which goods and services are produced and the physical characteristics of products that are manufactured" rather than "markets, rates, and the obligation to serve."⁷ A second difference is noted by Paul H. Weaver who argues that while older regulations reflected "populist-Progressive" values and gave considerable weight to the creation of a modern corporate economy that would honor individualism and other nineteenth century reformist premises, the newer regulations are the product of a "new class" "committed to 'humanistic' work in the not-for-profit and public sectors, and generally hostile to the economic accomplishments and political vision of the Progressive era."⁸ Thus, while the specific form of the differences between older and more recent regulatory policies are a matter of debate, the consensus is that new regulations are of a different nature than those which came before.

A third factor adding to the increased attention given government regulation is the costly impact it is having on economic, social, and governmental exchanges and institutions. A variety of studies have attempted to measure those costs in dollar terms, and while these analyses leave much to be desired methodologically, they do provide an indication of the effects regulatory activities are having. One often cited report (using 1976 figures) estimates that the federal regulation of economic activity carried a total bill of \$66.1 billion, with \$62.9 billion of that being attributed to target population "compliance costs."⁹ More narrowly focused studies put the costs for: tariff restrictions at \$10-15 billion per year; surface transportation regulations at \$3-8 billion per year during the 1960s; auto safety and auto pollution standards at \$3 billion in 1974; air and water regulations at \$24 to \$78 billion per year between 1973 and 1982; and so on. Zeroing in on specific industry impacts, analysts have estimated the copper industry will spend \$2 billion over the next decade to meet air and water pollution control requirements, while the paper and pulp industry is reported to have already expended \$1.2 billion on pollution abatement between 1969 and 1974. These and many more examples¹⁰ merely touch the surface costs of regulations, and have been further aggravated during the recent period of "stagflation" which has plagued the U.S. economy.

More important than the actual fact of increasing costs and stagflation is the growing awareness among the general public that the costs of government regulation are having an adverse impact on economic conditions. Recent polls indicate that a majority of Americans "believe that the current regulatory framework has its shortcomings--and their skepticism may be growing apace." Thus, one finds

increasing support for deregulation and other limits to or rollbacks of government intervention. Related research indicates that this skepticism and greater concern for regulatory costs is even higher among politicians and government officials.¹¹

It is within the context of these three general trends in regulatory policy (i.e., more regulators and regulations, the shifting nature of regulatory activity, an increasing concern for regulatory policy costs) that we must understand the significance of a fourth major development: the nationalization of regulatory policy. The centralization of authority in the U.S. is a long term trend familiar to most students of American public policy.¹² Outside the realm of foreign affairs, the national government was traditionally limited to a narrowly defined set of domestic policy problems. In fact, until the 1930s perhaps 90 percent of the "fundamental provisions of government" in the U.S. were enacted and implemented by state governments.¹³ While that situation did not change radically during and after the period of the New Deal, there has been an increasing federal involvement in an ever expanding list of government activities. In both fiscal and social welfare policies this expansion enhanced national powers during the post-World War Two period. But it was not until the early 1960s that regulatory functions historically associated with state, local, and private sector entities came under the jurisdiction of Washington's policymakers, and this trend escalated during the 1970s.¹⁴

Along with this nationalization has come an increase in the visibility of government regulations. If one focused exclusively on the historical development of national policy powers in the U.S., it would be easy to get the impression that regulatory activities were a minor form of policy action in America. However, regulations were not atypical of either municipal or state actions, even from colonial times. Construction standards, public health and safety regulations, and even standards to hold down air, water, and noise pollution were common to many localities. On the state level, the protection of farmers and manufacturers was behind many regulatory enactments.¹⁵ The geographic limits of these parochial jurisdictions tended to reduce the visibility of regulatory actions, and thus it was not until regulations became a national function that Americans and their policymakers began to take a hard, critical look at what they had bred.

However, the nationalization of regulatory policy has done more than merely draw attention to government activities. It has also had considerable impact on how governments operate at all levels. The means by which regulatory policy nationalization occurs can and has varied. The frequent assumption is that the nationalization of policy authority is directly related to the centralization of policy administration. This assumed correlation is inherent in a number of widely accepted theories used to explain the general trend toward nationalization.¹⁶ The facts indicate otherwise, however, since there are numerous examples of the concentration of authority accompanied by decentralized implementation mechanisms. As will be shown in the following sections, this is as true for regulatory policies as it has been for other forms of government activity. The difference is that the nationalization of regulatory policies is a relatively recent phenomenon, thus posing new situations and unique challenges for the intergovernmental system and those who participate in it.

III. The Delivery Options

The nationalization of regulatory policymaking authority should not be automatically associated with the centralization of regulatory policy administration. The simple distinction between policy formulation and implementation functions

must be stressed at the outset if we are to understand the options available to policymakers charged with designing mechanisms for administering nationalized regulatory policies. Although often linked, these functions are structurally separable both analytically and in fact. Who formulates a policy and how they go about their tasks are not necessarily correlated with a particular set of policy implementors or implementation procedures. It is on the basis of this premise that we can develop a typology of implementation mechanisms applicable to our analysis of nationalized regulatory policy.

An equally important premise is found in the view that regulations, like all government policies, can be perceived as deliverable goods and services. That is, it is not enough to regard a regulatory policy as a mere statement which has power just because it exists. Rather, a regulation, like a subsidy or service, must be delivered. For present purposes we assume a narrow definition of regulation by regarding it as a policy action¹⁷ by an authorized governmental agent¹⁸ imposing a specific standard of behavior on a target population under its jurisdiction. Given this delineation, we can examine how regulations are delivered without presuming that officials promoting or authorizing the establishment or sanctioning of regulatory policy actions are identical to those authorized to carry them out.

The possibilities for nationalized regulatory policy implementation logically follow once these premises are accepted and placed within the context of the American federal system. These include situations in which:

- (1) both the authorizing and authorized units are national (complete preemption);
- (2) the authorizing entity is a state government while the delivery of regulatory policy actions is national (federalization);
- (3) the national government authorizes or promotes the delivery of regulatory actions through interstate agreements or multi-state organizations (interstate organizations);
- (4) the national government authorizes or promotes the delivery of regulatory actions through state and local governments (intergovernmental relations).

Of these four possibilities, only the first and fourth have been extensively used in the delivery of nationalized regulatory policies, and the first was of greater significance in the past than the present.

Federalization is an idea usually associated with proposals to reform the delivery of social welfare policies. It is typically related to a fiscal crisis in states or cities and involves having national officials assume the responsibility for given policy functions at the behest of state and local officials.¹⁹ In nationalized regulatory policy actions, an approach resembling federalization has been used, but generally in emergency situations when state and local authorities have found conditions temporarily overwhelming. Examples are found mainly in activities involving immediate public health and safety problems, such as those associated with natural disasters or civil disorders. The sporadic, short-term, and localized nature of these efforts makes them unlikely models for more substantial long-term efforts to implement nationwide regulatory policy actions. On the one hand, it is unlikely that all states will simultaneously and of their own volition defer to national officials in policy areas where they retain legal authority to act. On the other hand, even if such mass deference was to occur, there is little likelihood that a single national agency would be capable of carrying out its functions without having to mobilize state and/or local authorities in their effort. In that situation federalization would actually become

merely a variation of the intergovernmental mechanisms that are being used to implement nationalized regulations.

Interstate organizations are also often proposed as mechanisms for implementing nationalized regulations, but they have in fact not been used in that role. Such mechanisms are rationalized on three primary grounds.²⁰ First, they would meet specific public problems at the appropriate scale of effort. That is, given problems may be of such a nature that neither national nor state and local efforts would be relevant. Certain problems and their potential solutions may be technically regional in character, thus rendering interstate efforts as most appropriate.²¹ In regard to this form of regulatory action, a regional approach to fighting water pollution in specific water basins or air pollution in contiguous areas would seem relevant.

Second, regional arrangements can facilitate the administrative coordination of national policies by bringing together relevant actors and resources at politically and economically more manageable levels.²² As a possible means for implementing regulatory policy on a nationwide basis, these organizations could be used to plan and oversee the consistency of enforcement efforts by member units.

Third and finally, regional organizations are often regarded as a means for checking the tendency toward the centralization of power while not barring the nationalization of effort. Thus, while they allow for the use of national resources in solving policy problems, they also decentralize the locus of national executive power through the establishment of distinct, functionally specialized, frequently autonomous government entities that can prove more flexible, adaptive, and open to regional interests and needs. Again, put in a regulatory policy context, this type of arrangement could prove politically feasible and economically beneficial by allowing for regional variations on nationwide regulatory standards.

In operation, regional organizations have performed regulatory functions, but none are national in scope or impact. Most of these entities are primarily planning and coordinating bodies and thus perform no regulatory tasks outside those administrative mandates they impose on their institutional members.²³ In the total picture of nationalized regulatory policies they are not treated as special regional implementing mechanisms, but as variants of state and local jurisdictions. In short, they are regarded as participants in the intergovernmental system rather than as unique exceptions to those relationships. As such they have not been utilized as a primary means for delivering nationwide regulations despite suggestions along those lines.²⁴ Nor is a change in this direction likely to prove politically or administratively feasible.²⁵ Regional organizations would be difficult to design on a nationwide basis and even more difficult to operate given the jurisdictional conflicts that inevitably arise. It is little wonder that this implementation mechanism for nationalized regulatory policies has not been utilized.

Complete preemption is not only more often applied, but is the most historically significant one. On a formal and legal level, preemption involves the national government's assertion and assumption of exclusive jurisdiction over policy formulation and implementation functions in an issue area. As applied here, the idea of preemption is taken literally and is understood to entail the complete assumption of regulatory policymaking and policy implementation authority. In this extreme form,²⁶ preemption mandates that national officials totally occupy a "field" to the exclusion of...state action."²⁷

In spite of its historical and constitutional significance, especially in relation to regulations rooted in the commerce power,²⁸ the recent application

of these preemptive mechanisms has been limited. This is not to say that Congress has been reluctant to assert its authority in constitutionally preemptive terms. To the contrary, there have been a number of recent and significant legislative actions bluntly declaring it "to be the intent of Congress that the provisions of the Act shall supersede any and all laws of the States and political subdivisions thereof insofar as they may now or hereafter provide for..."²⁹ However, among these acts there are few which have explicitly preempted both the power to formulate and the power to implement regulatory policy actions. In most cases the details of implementation and enforcement are either vaguely defined or else indicate a role for state or local governments in the implementation of the act.³⁰

There is one major exception, but even that is limited in effect and qualified. Section 209(a) of the 1970 Clean Air Act expressly prohibits states or their subdivisions from adopting or attempting "to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicles' engines" subject to the Act's motor vehicle emission and fuel standards. According to Lettie Wanner, this provision "constituted the first and only congressional mandate to EPA to undertake directly enforcement of pollution controls without the assistance of state government."³¹ However, there were several loopholes in this assertion of complete preemption. For one thing, states were given jurisdiction over the maintenance of these standards and related control devices once the vehicles were purchased and on the road. For another, the 1970 Act contained a major exemption to this preemption. Termed the "California waiver," it allowed that state to impose more stringent controls.³² Section 177 of the Act as amended in 1977 extends this exemption to specially designated "nonattainment" areas.

The fourth and final group of delivery mechanisms for nationalized regulatory policies are intergovernmental, and they are obviously the preferred option among the four types available to policymakers. At the heart of intergovernmental mechanisms is the assumption that regulatory policy formulation and implementation are separable in fact as well as in theory. However, relying on state, local, and even regional entities to administer a set of nationally applicable regulations seems to violate several principles of "good" management. The use of intergovernmental mechanisms would seem to be an open invitation to those seeking to qualify and subvert nationwide policy actions, and some analysts have demonstrated that a "Gresham's Law of Regulation" (i.e. "less stringent regulations chase out more stringent regulations")³³ is evident in certain regulatory areas. Yet, there are a number of factors which can explain the tendency to place implementation responsibilities with lower level jurisdictions.

First among these are the forces of history, particularly as these reflect long standing constitutional traditions. Despite the increasing trend toward the nationalization of American public policy, there has rarely been any serious consideration given to proposals to abolish states.³⁴ Local government units have proven less sacrosanct and there have been some successful (although hard fought) efforts toward metropolitan consolidation.³⁵ Tradition does not die easily, and this is as true of government functions (e.g., building codes, water quality control, and highway traffic speed limits) as it is of government jurisdictions. It is not surprising, therefore, to find national policymakers deferring in part to states and localities by allowing them to implement regulatory policies set in Washington.

A second and related factor is more ideological, for there exists a deeply rooted bias within America's political culture favoring decentralized governance.³⁶

This belief in the value of state and local policymaking and policy implementation may seem irrational or based on a number of potentially questionable assumptions (e.g., local governments are "more representative," "more flexible and adaptable," more familiar with the "needs and desires" of local populations), but it nevertheless is a force to be contended with by policymakers and others involved in the design of nationalized regulatory policies. Under the influence of this bias national policymakers are likely to minimize the extent of centralization by either providing for the participation of lower level jurisdictions in the formulation of regulatory policies or leaving the administration of regulations to state and local officials.

A third factor favoring the use of intergovernmental mechanisms is the technical nature of the problems being regulated. There are certain subjects of regulation calling for nationwide policy actions which, nevertheless, also demand that regulatory treatments be adjusted to regional and local conditions. In energy conservation, for example, a national regulatory policy that might call for new commercial buildings to achieve a minimum level of energy efficiency would seem desirable in theory, but in practice would prove extremely difficult to enforce. The technical benefits to be gained from relying on state or local officials are obvious. Standards appropriate to achieving national goals will differ from region to region and city to city given differences in geography, climate, and even economic and social conditions.³⁷ In the face of these variations, the use of intergovernmental relations seems appropriate.

The administrative capabilities and fiscal resources of various levels of government are also factors favoring intergovernmental policy mechanisms. One commonly cited characteristic of America's federal system is the uneven distribution of those capabilities and resources. The national government has traditionally relied on transfer payments, grants-in-aid, and other forms of indirect policy implementation, and has rarely established the organizations or a pool of trained personnel needed to carry out large scale policy operations. It has offset this with a revenue raising capacity that provides national policymakers with a substantial advantage over state and local officials. Taken together, these characteristics provide a powerful reason for Washington's reliance on lower level jurisdictions to carry out a variety of national functions, including the delivery of nationalized regulatory policies.

Fifth and finally, political factors are an important determinant of the use of intergovernmental mechanisms. Viewing politics as the mobilization of bias, Schattschneider and others³⁸ have indicated how political conflicts can be escalated or reduced as part of the tactics employed by interests involved in a policy debate. The "privatization" or "socialization" of conflict is particularly relevant to political battles taking place within the American federal system. Simply put, an interest "losing" at one level or merely wishing to improve its standing in a political conflict can attempt to change from that level to another in a political conflict. Thus, if you are not getting your way with the state legislature you might choose to raise the issue either locally in a city council or nationally in Congress. Given this perspective, one can explain the recent emergence of nationalized regulatory policies as a reflection of the increasing socialization of conflict from local, state, and non-public arenas to the national stage. Many activists--e.g., environmentalists, consumer protectionists, Naderites--realized that theirs was a national constituency, and that only by working in national policymaking arenas could they achieve their regulatory policy objectives.³⁹ Simultaneously, however, there have been forces at work attempting to counter these efforts by seeking to privatize the conflict or

otherwise reduce it to an issue involving lower level jurisdictions. The typical result of this "push" and "pull" between socialization and privatization is a compromise in which a generally applicable policy is authorized by national officials, but with the stipulation that implementation would be left to state or local bodies.

The overall result of these five factors is a variety of intergovernmental delivery mechanisms for regulatory policies. The specific forms involved vary along two basic dimensions: (1) the extent to which lower level jurisdictions participate of their own volition, and (2) the degree of discretion permitted to state and local officials in determining the specifics of a nationalized regulatory policy action.

While the fundamental structure of the federal system (i.e. national-state-local) lends itself to centralized organization and hierarchical relationships, in both constitutional theory and early historical practice the stress has been on noncentralized structures and fluid, pragmatically developed interactions among the many units making up the system.⁴⁰ Centralized and hierarchical tendencies have become increasingly evident in recent decades, but there remains a propensity among national policymakers to avoid overtly mandating state and local actions on behalf of national policy objectives. Therefore, one is likely to find that lower level jurisdictions are often permitted a large degree of freedom in choosing to participate in the implementation of national policies. In other cases the degree of choice is either nonexistent or merely symbolic. Between these extremes is the range of intergovernmental arrangements which either promote or constrain the options available to state and local officials in the face of national policy demands.⁴¹

The amount of substantive policy discretion allowed state and local officials will vary in a similar fashion. National regulations can be either specific or vague. In certain cases the regulatory action or goal may be narrowly defined, and the substantive policy discretion allowed to states and localities is likely to be minimal. However, there are situations which allow state and local officials a considerable amount of choice in determining the objectives of regulatory actions and how they will be implemented. By issuing general guidelines for these policy efforts, national policymakers may seek their regulatory objectives while deferring to state and local decisions in most matters. As with the degree of volition, there is an almost infinite range of options for delivering nationalized regulatory policies.

These two dimensions are graphically correlated in Figure 1. The resulting matrix illustrates the range of options available to policymakers in their efforts to deliver nationalized regulatory policies through intergovernmental mechanisms. An operational approach representative of each cell is provided in the figure and in the next section we describe and offer examples of each.

DEGREE OF VOLITION ALLOWED LOWER
LEVEL JURISDICTIONS:

		Low-----High	
DEGREE OF SUBSTANTIVE POLICY DISCRETION :	Low	Legal Conscription	Assertion of Preemptive Capabilities
	High	Financial Assistance	Technical Assistance

FIGURE 1

IV. Four Intergovernmental Mechanisms

A. Technical Assistance: With Neither "Carrot" Nor "Stick"

Each of the four representative mechanisms highlighted in Figure 1 are distinctive not only due to the degree of volition and discretion they allow state and local officials, but also in terms of the conditions they require for their effective application to specific regulatory policy efforts. This is especially true for technical assistance mechanisms. In its purest form, technical assistance involves neither the "carrot" nor the "stick" which is characteristic of the other three approaches to be discussed below. By definition it refers "to programs, activities, and services provided by the Federal Government, a Public Interest group, or another Third Party to strengthen the capacity of recipients to improve their performance with respect to inherent or assigned function."⁴² While this kind of assistance can be linked to a grant (or other form of aid) or perhaps even made mandatory through the imposition of sanctions,⁴³ we are concerned with its use when unencumbered by "strings" in the form of either rewards or punishments.

Technical assistance usually takes three forms.⁴⁴ First, it involves "general management assistance" aimed at helping recipient units build their capacity to deal with general purpose government functions, e.g. planning, budgeting, staffing. Second, it takes the form of "technology transfer and sharing" programs which disseminate information that recipient units might find relevant and useful to their tasks. Finally, technical assistance can be used to deliver management and/or technical services (i.e. "functional assistance") appropriate for specific programs or projects of the recipient government.

It is this last form of technical assistance that has been used to deliver nationalized regulatory policies. The surprising thing is that a form of functional assistance has been used quite successfully for this purpose since at least the turn of the century.

The primary example is the national standard of weights and measures implemented through state and local agencies by the Department of Commerce's National Bureau of Standards (NBS). National authorities in this particular area are given authority over uniform weights and measures in Article I, Section 8 of the U.S. Constitution, and the federal government has been active in this area through NBS and its predecessors since the early 1800s.⁴⁵ Yet this is a policy arena in which national regulatory standards are effectively delivered by state and local officials without the use of coercive sanctions and with a great deal of discretion being left to lower level jurisdictions regarding the details of implementation and enforcement.

At the heart of this system of regulatory policy delivery are the technical services NBS provides for state and local officials. As the legally accepted reference for standard weights and measures, NBS derives considerable power from its acknowledged legitimacy on these matters. In addition, it has organized itself as a government laboratory ready to serve the needs of its clientele rather than as an enforcement agency ready to assert its constitutionally sanctioned authority. Through annual conferences on weights and measures it offers general advice and maintains its long term functional dominance of the field. In case a unique or immediate problem arises, NBS is capable of mobilizing a team of highly trained scientists and technicians to develop solutions. And all the while the regulatory policy actions which maintain a nationally uniform set of weights and measures are being delivered by state and/or municipal inspectors who are enforcing the statutes and codes of their own jurisdictions.

There seem to be at least three factors which make this approach viable. First, the subject of the regulatory effort is perceived as technical, therefore

making functional assistance an appropriate channel for intergovernmental interaction. The less technical the subject is perceived to be, the more likely it is that state and local policymakers would be willing to inject their own values and priorities into the decision-making and implementation processes. Related to this is a second factor: the perceived legitimacy of those providing the services. This legitimacy can be built on grounds of either law or "expertness" or a combination of both. In weights and measures, NBS derives its legitimacy from both. On the one hand, through constitutional delegation and Congressional action, NBS is empowered to be the sole determinant of national standards in this area. On the other hand, NBS's status and reputation as a "scientific" organization with unquestionable expertise in the field of weights and measures makes it the obvious resource for state and local officials dealing in this area. Third and finally, the regulated activity should already be the subject of state and local government policies. In the absence of both federal "carrots" and "sticks," the nationalization of regulatory policy through a voluntary mechanism such as technical assistance will succeed only where an operational unit is in place within recipient jurisdictions. NBS's job is made much easier, for example, by the fact that the regulation of commercial weights and measures is regarded as a common function of lower level jurisdictions. Without a relevant state or local agency to implement these standards, NBS would have to turn to other arrangements or at least create appropriate state and local agents.

As a model for more recent efforts at nationalizing regulatory policy, the technical assistance approach is being used again by NBS, this time in regard to building codes. The rationale for nationalizing building code standards is both technical and political. Technically, it is possible--and for many officials, desirable--to develop a national system of effective "performance standards" regarding building structures and construction materials that can be adapted to specific regional and local needs. This has become "possible" due to advances in both communications and building technology which improve the dissemination of information, and "desirable" due to the pressures derived from recent economic and energy crises. Politically, efforts to change local building codes are a manifestation of recent regulatory reform movements.⁴⁶ Increasing the role of performance standards in building codes would not only make these regulations less arbitrary, but would also help break the hold of local cartel-like arrangements in the construction industry. It would simultaneously promote innovation and help stimulate rehabilitation projects and energy conservation experiments.

Whatever the specific reasons behind the nationalization of building code standards, the use of technical assistance mechanisms to implement them are well under way. However, of the three major conditions needed for the successful application of technical assistance in this implementation effort, only one is "in place", i.e. regulation through building code is a common function of state and local governments. Whether these codes are perceived as technical issues and whether NBS's role is regarded as legitimate are the more important problems to be solved if this nationalization effort is to have a chance for success.

NBS has attempted to solve these problems through a strategy based on its statutory function to encourage, in cooperation "with other governmental agencies and with private organizations", the "establishment of standard practices, incorporated in codes and specifications."⁴⁷ Applying this general objective and utilizing its reputation as a primary "state-of-the-art" consultant on technical issues related to problems of measurement,⁴⁸ NBS conducted a survey of the states in 1967 to ascertain their interest in establishing a "consortium of state building administrators" to deal with common issues of building regulation.⁴⁹ The response was posi-

tive, and NBS guided the creation of such an organization with technical assistance and administrative support. By December, 1967 the National Conference of States on Building Codes and Standards (NCSBCS) was a reality. From 1968 to 1975, under NBS guidance, NCSBCS grew in size and influence as a regulatory delivery mechanism.⁵⁰

In 1975, NCSBCS was incorporated as a separate non-profit organization.⁵¹ NBS still provides a substantial amount of technical assistance to NCSBCS, and the two organizations jointly sponsor an annual conference on building regulations as well as other specialized meetings.⁵² In short, the NBS-NCSBCS relationship is a firm and continuing one.

How effective has the "NCSBCS-strategy" been in NBS's efforts to develop a nationally-accepted building code regulatory system through technical assistance? NCSBCS has been an effective vehicle for creating a sense of agreement among various state officials and the governments they represent. Its model acts and codes have drawn considerable attention and have been adopted in many jurisdictions. Working in conjunction with HUD, NCSBCS has played a central role in the Mobile Home Standards Enforcement Program which is applied in many states. The energy crisis has also helped facilitate this implementation effort by enhancing the legitimacy of technically-based building regulations in state and local conservation programs. Twenty-six states have already adopted NCSBCS's "National Code for Energy Conservation in New Buildings", and with the technical assistance provided by NBS's National Engineering Laboratories, NCSBCS has developed a widely used "Building Energy Performance Standards Program."

Extending these efforts to local governments provides an even greater challenge. In 1966, the Advisory Commission of Intergovernmental Relations estimated that approximately 8,000 government units had some form of building code policy. Promoting statewide code adoptions is one tactic, but local circumstances--both political and technical--tend to make statewide solutions inappropriate or impossible. In the face of this, the technical assistance approach has been applied to major local jurisdictions, and following the NBS-model NCSBCS has helped create and operate the Association of Major City Building Officials.

The jury is still out on these attempts to nationalize building code regulations, but the preliminary verdict seems positive. No doubt the efforts of NBS are being aided by a variety of financial and legal programs operated through HUD, the Department of Energy, and related agencies. Nevertheless, this implementation approach does show promise as a distinctive mechanism useful under certain conditions that can facilitate national goals while imposing minimal burdens on lower level jurisdictions.

B. Financial Assistance: The Tightening Strings

Intergovernmental relations are often based on fiscal ties among participating units. This financial link is so common and important that intergovernmental relationships are frequently defined as fiscal interactions.⁵³ Therefore, it is not surprising that the nationalization of regulatory policy has come to rely heavily upon grants-in-aid and related mechanisms. The key to utilizing financial assistance is the attachment of "strings" to grants which reward or punish specific actions by recipient jurisdictions. Designing this system of carrots and sticks specifically to promote the implementation of nationalized regulations by state and local governments is the challenge.

The tools needed to meet that challenge are found among the great variety of "mandates" which accompany federal grants. For our purposes, a mandate "is any responsibility, action, procedure, or anything else...imposed by constitutional, legislative, administrative, executive or judicial action...that is

required as a condition of aid."⁵⁴ These mandates come in many forms, but again for our purposes we will focus on two characteristics: (1) what they require of recipients and (2) the parameters of their application.

Mandates are either organizational/procedural or programmatic. Organizational/procedural mandates constituted most of the early forms of conditions attached to federal grants-in-aid, and were originally regarded as a means for improving state and local governments rather than as a means for achieving certain national policy goals. Along these lines, receipt of federal funding depended on such things as reorganizing a recipient agency, hiring "professionals," or the adoption of civil service personnel procedures in relevant program units. More recent mandates of this nature demand that recipient program units perform their tasks in a certain way, keep records and report about program activities in a certain fashion, hire and pay personnel according to a given set of rules, and carry out planning and evaluation functions. While these organizational/procedural mandates may ultimately affect what regulatory policies are adopted and enforced by state and local officials, they are not intended for that purpose. Rather, these are administrative regulations intended to influence the performance of government agencies, and not the behavior of clientele groups or some other target population.

Programmatic mandate requirements, on the other hand, can result in state and local officials imposing a nationally designed or sanctioned regulation on a targeted group within a given jurisdiction. On a general level, these mandates can address three aspects of a required program or policy: first, that it exists (program mandates); second, that it be applied at a given quantitative level (program quantity mandates); and third, that it be of a certain quality (program quality mandates).⁵⁵ Thus, a grant might require that a municipality have a public housing policy (program), that the policy generate x number of new public housing units each year (program quantity), and that the units meet specified standards such as location, type of occupancy (e.g. family, elderly), and so forth (program quality). Applied to a regulatory policy area such as building codes, a set of mandates might require that a municipality receiving HUD funds have a code (program), that the code's enforcement involve ten full time inspectors (program quantity), or that it be based on performance standards set forth in a NCSBCS model code (program quality). It is through these programmatic requirements that mandates can be made effective vehicles for implementing nationalized regulatory policies.

The second dimension of mandates relevant to our discussion sets forth their application parameters. Simply put, mandates are either "vertical" or "horizontal." Vertical mandates establish requirements within narrowly delineated policy areas. Thus, while a building code may be required by conditions laid out in a HUD urban renewal grant, the same requirement is unlikely to be found attached to a Law Enforcement Administration grant. Horizontal requirements, however, cut across often dissimilar and unrelated grant programs.⁵⁶

Putting these two dimensions together in a matrix, we can illustrate the major forms these financial assistance mechanisms can take. Figure 2 also specifies the examples for each cell that are briefly discussed below.

An example of a vertical program mandate used to implement a national regulatory policy is the 1972 Coastal Zone Management Act.⁵⁷ Although the Act itself affects only coastal states, Section 303 makes it quite explicit that Congress intended it to be "the national policy... (t)o encourage and assist the States to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve the wise use of land and

water resources..."⁵⁸ Federal support for such state programs came in the form of grants to be issued under provisions set forth in Section 305 of the Act. Those provisions call for recipient states to: (1) "identify the boundaries" of the zone subject to their program; (2) "identify land and water uses which have direct and significant impacts on coastal waters"; (3) inventory "geographic areas of particular concern"; (4) "develop broad guidelines on priorities of uses" within those areas; (5) "describe the organizational structure that will be used to implement the management program"; (6) "include a planning process that can identify public shorsfront areas appropriate for increased access and/or protection"; (7) "include a planning process that can anticipate and manage the impacts from energy facilities in or significantly affecting the State's coastal zone"; (8) "include a planning process that can assess the effects of shoreline erosion..."; and, (9) most relevant for our purposes, "identify the means by which they will exert control over land and water uses subject to the management program."⁵⁹

Program	Vertical	Horizontal
	Coastal Zone Management	Court approved desegregation plans
Program Quantity	Certificates of Need Program	10% minority business participation in Public Works programs
Program Quality	55 m.p.h. maximum highway speed limit	Architectural Barriers Act requirements

Figure 2

In short, money was made available to recipient units if they would establish a coastal zone management program, and if that program include the regulatory means for dealing with coastal zone issues. There are some details provided,⁶⁰ but only in very general terms. One analyst described the act as little more than a "gentle nudge",⁶¹ and this is typical of most vertical program mandate approaches, i.e. they rely heavily on the willingness of potential recipients to participate, and when they do there is considerable discretion left to state and local officials. What differentiates these from technical assistance strategies is the strong pull of financial aid. The carrot is offered as an inducement for voluntary action, thus rendering the degree of volition somewhat less than when the federal government does no more than make technical services available.

Turning to vertical program quantity mandates, the federal certificates of need (CON) program provides an example.⁶² Under the National Health Planning and Resources Development Act of 1974,⁶³ a CON program was to be in place in every state by September 1980 using minimal standards set forth by HEW and implementation mechanisms organized on state and substate levels. These standards were intended to help regulate and plan health care delivery systems in ways that would improve the quality and distribution of such services while reducing aggregate costs. The use of minimal standards regarding substate needs was typically quantitative, with national guidelines allowing for a distribution of certain health care facilities (e.g. intensive care units, CAT scanners) given the number, nature, and distribution of local populations. The "catch" was that, while tech-

nically voluntary, states not complying with CON program requirements would have Medicaid, child health care, and other health care related funding cut off. Thus, in aid programs such as this there is a tendency for both the degrees of volition and discretion to be reduced--although the option not to participate or comply still exists.

The most obvious example of a vertical program quality mandate is the 55 m.p.h. maximum highway speed requirement attached to highway funding programs during the early 1970s. Highway funds, like all federal aid, are technically optional, particularly in the area of road maintenance. From the outset they have involved "strings", but these have primarily been procedural or substantively technical (e.g. materials to be used, engineering standards to be applied in designing roads, etc.). The imposition of a specific national program quality mandate such as the 55 m.p.h. speed limit constituted a major shift, for it involved a Congressionally determined regulatory policy that was to be adopted and implemented by states as their own. To challenge this mandate was to risk losing access to a significant source of funding--a threat no state has been willing to test, although at least two (Wyoming and Oklahoma) have made gestures in that direction. The degrees of volition and discretion have proven extremely low in this instance.

Examples of horizontal or cross-cutting mandates also reflect a variety of uses, some procedural and some substantive. Their application is based on the judicially accepted principle that the federal government "may properly attach terms and conditions to grants-in-aid to States, as long as such conditions are related to a legitimately national purpose and are not coercive."⁶⁴ Major horizontal mandate tools include Title VI of the 1964 Civil Rights Act which forbids federal funding for organizations or government units that discriminate. This has been interpreted not only to make federal agency participation illegal, but also to make it the grantor's "affirmative duty" to monitor and prevent discriminatory actions by funded entities.⁶⁵ For the most part this has been an organizational/procedural mandate since the courts have narrowly defined Title VI to call for the termination of aid only to the specific program in which discriminatory action has been proven.⁶⁶

In educational funding, however, the situation is different. If a recipient school district is lacking a court-approved desegregation plan, its funds may be cut-off under Title VI provisions.⁶⁷ This use of Title VI as a horizontal program mandate has been at the heart of many confrontations both in and out of the courtroom. A horizontal program quantity mandate related to Title VI provisions is found in the 1977 Public Works Employment Act. That act requires that there be at least 10 percent minority business participation in the funded projects.⁶⁸ Under the category of horizontal program quality mandates there are very few examples since national policymakers have been reluctant to create entire programs which are mandates for state and local adoption using the threat of withholding federal assistance.⁶⁹ One possible example is found in provisions of the Architectural Barriers Act of 1968 denying federal funds to any state or local agency which does not have an acceptable policy of "accessibility" for handicapped persons in all buildings and other public areas leased by the national government or whose construction is in part funded through Washington, and for all "public conveyances" within their respective jurisdictions.⁷⁰

There are many more instances of how intergovernmental financial assistance mechanisms have been mobilized to implement nationalized regulatory policies.⁷¹ These mechanisms also serve a variety of other purposes (administrative, political),⁷²

and often alternative objectives take priority or otherwise contradict nationalization goals. What we are witnessing, however, is a developing situation in which the national government's ability to use financial assistance to implement regulatory programs is gaining strength. State and local governments are becoming increasingly dependent on the many categorical and block grants generated in Washington,⁷³ and there is some evidence that the priorities of officials at those levels are being reshaped by the programmatic opportunities they are offered. Under conditions of "fiscal stress" these tendencies are likely to be reinforced,⁷⁴ and Washington's ability to fashion an effective intergovernmental delivery system for national regulations is going to improve in the process.

C. Asserting Preemptive Capabilities: Using the Big Option

As noted above, complete preemption of a field by the national government is one major method for bringing about the nationalization of regulatory policy. In that instance we discussed the unqualified occupation of a field by Washington--a method used more in the past than present. Nevertheless, a less than complete form of preemption continues to play a significant role today, but now in the context of intergovernmental strategies.⁷⁵

The idea of using preemption to stimulate state and local participation in a nationwide policy system is not new. Its first major application as a delivery mechanism dates back to Washington's role in establishing the unemployment compensation system now in force in all 50 states. What is unique about that accomplishment is that all 50 states opted to join the system with full knowledge that federal officials would institute the policy if the state chose not to.⁷⁶

The reasoning behind this approach is that if preemption gives national officials total jurisdiction over the formulation and implementation of a policy in a given field, then it also provides them with the ability to delegate their powers to lower level jurisdictions if they so desire for purposes of carrying out national policy objectives. Formally this would involve (1) the legal assertion that the federal government was preempting state and local jurisdiction in a field, followed by (2) the development of a national program organized on a state-by-state basis which includes (3) provisions and incentives for state and local assumption of all program responsibilities within their jurisdictions with (4) the stipulation that these state or local programs meet a detailed set of structural, procedural, and substantive policy standards. Thus we have a system in which participation is highly voluntary but discretion is relatively low.

A case in point is the Occupational Safety and Health Act of 1970⁷⁷ which asserts that it is the "purpose and policy" of Congress (under its commerce powers) "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources..."⁷⁸ State jurisdiction in such matters is technically preempted, and in Section 6 the Secretary of Labor is given the responsibility for instituting national standards for occupational safety and health. Having established the legal supremacy of national authority in this field, the Act goes on to provide two roles for the states. First, Section 18 explicitly allows for state action in those areas where the Secretary had chosen not to promulgate rules and regulations. Second and more importantly, Sections 18(b) and 18(c)(2) permit states to develop and enforce their own safety and health standards if those are at least as effective as the national standards established under Section 6. Whether state programs meet that criterion is to be determined by the Secretary of Labor.

The incentives used to draw states into the OSHA system are set forth in Section 23 of the Act, and the emphasis is on providing financial assistance for states to study and plan for their involvement (up to 90 percent) followed by aid of up to 50 percent for the administration of a plan acceptable to the Secretary. This approach has proven only partly successful, for by 1977 only 23 states had processed approved plans while interest among the others was waning.⁷⁹ This is a relatively poor performance in light of the complete acceptance of a similar option offered the states in the unemployment compensation program set up under the 1935 Social Security Act. (In that instance the incentive was tied into a "tax offset" mechanism which would be difficult to apply in a regulatory program such as OSHA.)⁸⁰ OSHA remains the primary example of this approach for the nationalization of regulatory policy actions, but it is a system coming into increasing use in areas such as strip mining⁸¹ and through judicial decisions which have had the effect of allowing state involvement in supposedly preempted areas.⁸²

D. Legal Conscription: Toward Unitary Government

Of all the intergovernmental mechanisms used to nationalize regulatory policy, none is more revolutionary than the approach first applied in the Clean Air Act Amendments of 1970. It is an approach minimizing both the voluntariness of state and local participation and the substantive policy discretion provided for officials in subnational units. In fact, it is a mechanism which challenges the very essence of federalism as a noncentralized system of separate legal jurisdictions, and instead relies upon a unitary vision involving hierarchically related central and peripheral units. It is an arrangement that goes beyond complete preemption of the assertion of preemptive capabilities. Rather it focuses political and administrative attention on national problems and assumes that policy solutions should determine the relationships among national and sub-national governments. Using this logic, it is an approach allowing national policymakers and policy implementors to mobilize state and local resources on behalf of a national policy program. As preliminary measures, these resources can be mobilized using technical, financial, or other forms of assistance; but underlying this mechanism is the ability of national officials to formally and officially "draft" those resources into national service. We call this "legal conscription."

As the first major use of this approach, the 1970 Clean Air Act Amendments (CAA) is a prime model for describing "legal conscription." Ironically, the CAA begins by noting "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments..."⁸³ This declaration is immediately qualified by the finding "that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution."⁸⁴ Given these grounds for action, the CAA asserts that each state must submit an "implementation plan" covering its "entire geographic area" specifying "the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State."⁸⁵ These implementation plans were to be based on air quality criteria and control techniques found to be acceptable by the Administrator of the Environmental Protection Agency (EPA)⁸⁶ who is also responsible for issuing the national ambient air quality standards to be adopted, maintained, and enforced by the states.⁸⁷ And if a state "fails to submit an implementation plan" meeting those standards, or if the EPA Administrator finds a submitted plan unacceptable and the state does not meet EPA objections "within 60 days after

notification," then the Administrator "shall...promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State..."⁸⁸ Similar provisions are also in place for national performance standards to be applied to "new stationary sources."⁸⁹ Regarding enforcement, provisions in Section 113 of the 1970 CAA make it clear that it is the responsibility of states to carry out the approved implementation plans, and if 30 days after notification by the EPA Administrator they do not enforce the plan, the EPA will take over such duties.⁹⁰

There are some other mechanisms used in the 1970 CAA which are less demanding of states. We have already noted that (with exceptions) state involvement in new motor vehicle engine emission standards is completely preempted,⁹¹ and the same holds true for aircraft emission standards.⁹² In addition, there are certain provisions resembling the "assertion of preemptive capabilities" approach discussed above. Thus, a state may, at its own volition and with the approval of EPA, implement and enforce emission standards for hazardous air pollutants.⁹³ Similarly, a state can opt to participate in the inspection and monitoring of emission sources if its plans for this participation are approved.⁹⁴ However, in neither instance does this mean the Administrator cannot assert EPA's authority to carry out those tasks. And finally, the CAA does make use of financial assistance mechanisms by authorizing the Administrator to offer aid of from 50 percent to two-thirds of the costs for planning, improving, and maintaining air pollution control programs.⁹⁵ Nor did the CAA cut off all policy input for the states in those areas in which it applies "legal conscription." Very prominent in the Act is Section 116 stating that, except where noted, nothing in the legislation "shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce" a regulation that is at least as stringent as those provided by EPA.

In spite of these exceptions, the 1970 CAA represents a major alteration in national-subnational relations. The unitary system it assumes shows up most clearly in sections dealing with ambient air quality standards and performance standards set for new stationary sources. The precedent it sets has not gone unfulfilled. Major modifications of the CAA in 1974 and 1977⁹⁶ failed to make any significant changes in these provisions, and in fact may have further enhanced them. These mechanisms were also used in the Federal Water Pollution Control Act Amendments (FWPCA) of 1972.⁹⁷ In fact, many FWPCA provisions seem a direct copy of those in the CAA. In Section 402(c), for instance, the Act requires that all permits granted by the states under the National Pollution Discharge Elimination System (also established by FWPCA) must comply with national minimal standards. Another case in point is Section 303 of FWPCA which stipulates that states may adopt water quality standards of their own in addition to those set forth by the EPA Administrator, but (as in CAA) these must be reviewed and approved by EPA to assure that they are at least as stringent as the national standards.

An even more significant adoption of the "legal conscription" approach is found in the 1978 National Energy Policy Acts. For example, Section 212 of the National Energy Conservation Policy Act⁹⁸ (NECPA) mandates that the Department of Energy (DOE) establish standards for the safety, effectiveness, and installation of energy conservation efforts, and that these be incorporated in state "Residential Energy Conservation Plans" which must be submitted by the governor of each state within a specified time. If no such plan is forthcoming or found acceptable, DOE's Secretary is authorized to promulgate and implement such a plan.⁹⁹ Similarly, the legal conscription approach is used in Title III of NECPA which mandates state plans for energy conservation programs in schools, hospitals,

and other public buildings. If a state plan fails to get Washington's approval, the Secretary may issue and force implementation of a DOE plan.

While legal conscription mechanisms are "on the books" they have seen rather limited use. For a variety of reasons we will not go into here, national policy-makers and policy implementors are likely to prefer less coercive and more indirect approaches--those which provide either greater discretion or volition for state and local officials. Yet legal conscription is a potentially powerful tool for national officials to use, and in the case of environmental protection we may see greater reliance on it in the near future. For the moment, however, it is only a "high explosive" in the arsenal of intergovernmental mechanisms that can be used to nationalize regulatory policies.

V. Implications

As a major trend in American public policy, the nationalization of regulatory policy can be easily documented. In this paper we have focused on one aspect of that trend which might, in the long term, prove even more significant than the nationalization process itself: the increasing utilization of intergovernmental mechanisms to deliver those regulatory actions.

The implications of this development will, of course, have a direct influence on regulatory efforts. There can be little doubt that the effectiveness and efficiency of public sector actions to achieve policy objectives through regulation will be affected by the choice of an intergovernmental delivery mechanism. Under certain conditions the use of these mechanisms may prove technically and administratively justified. For instance, where regulated acts or conditions vary from location to location, it might prove beneficial to leave the specific content of nationally sponsored regulations to the judgment of state or local officials. And even where local circumstances do not warrant such discretion, the distribution of available human and financial resources among jurisdictions may mandate that subnational officials undertake various administrative responsibilities associated with a given set of regulatory policies. In most cases, however, the fact that intergovernmental approaches prove appropriate and relevant seems more the result of fortuitous coincidence than calculated design.¹⁰⁰ Were it possible to associate the effectiveness and efficiency of a regulatory policy endeavor with a particular intergovernmental delivery mechanism, the possibility of designing nationwide regulations would be enhanced. For that reason alone it might be fruitful to investigate the immediate policy implications of the four mechanisms.

But it is the systematic implications that will ultimately prove more interesting, for the growing reliance on these intergovernmental mechanisms will inevitably take its toll on America's political institutions and relationships. The major dimensions of these systemic implications are threefold: fiscal, political, and legal/constitutional. In this brief conclusion we will touch upon each implication both in terms of its actual impact and the potential effects it might have in the near future.

Fiscal implications. In the current period of "fiscal stress" and economic "stagflation," the past behavior of governments seems perverse and almost self-destructive. We often forget how comfortable we were as an "affluent society," and how satisfied we were with a policy system that "distributed" and even "redistributed" rather than "regulated."¹⁰¹ It was a time when intergovernmental relations were truly "cooperative," and when the relationships among federal, state, and local units were essentially "fiscally facilitative." That is, until recently intergovernmental relations were marked by two fundamental characteristics: first, they were primarily based on financial assistance with funds flowing from the center to periphery units, and second, when conditions were attached to that assistance, they were typically designed to enhance subnational (as opposed to national) policy objectives and program implementation.¹⁰²

While recipient units might have felt at times that the organizational/procedural "strings" and mandates attached to many grants were arbitrary and bothersome, these requirements were rarely intended as means for "controlling" state and local officials or making them mere agents of the national government. But all this changed in the middle 1960s, specifically with the passage of the 1964 Civil Rights Act. This early period witnessed a shift in national policy-maker intentions, for from that time forward there has been a growing tendency to use intergovernmental relations as a means for asserting national control over state and local policies.

A second and related development emerged during the recent period of fiscal conservatism. This past decade has been characterized by budget cuts, sunset laws, deregulation programs, Proposition 13s and associated retreats from "distributive politics." It has also witnessed an increasing propensity on the part of national officials to rely on regulation rather than spending, and the delegation of authority rather than the acceptance of responsibility. The result has been twofold: first, an intergovernmental system that is more capable of imposing national policy requirements on subnational actors; and second, a declining reliance on financial assistance alone to accomplish that control. The fiscal implications of utilizing each intergovernmental mechanism must be examined within the context of these developments.

Generating state and local cooperation through technical assistance programs alone is, as we have noted, a rarely used approach. For an agency such as NBS to successfully nationalize building code regulations there must exist the "right combination" of time, technical policy conditions, resources, and personnel. Obviously, when these conditions are all present the technical assistance approach promises to have minimal impact on government spending. Creating and maintaining the intergovernmental organizations (e.g. NCSBCS) and relationships needed to carry out the assistance program would call for adjustments in expenditures by governments at all levels, but these should prove relatively insignificant.

Where optimal conditions do not exist, however, the technical assistance strategy for nationalizing regulatory policies will have to be supplemented with alternative mechanisms. Using the building code example, financial assistance can be made available to those jurisdictions needing help in developing the necessary infrastructures or training programs that would make it possible to participate in the technical assistance effort. This is, in fact, an ingredient in the current NBS-NCSBCS strategy. It might also be possible for NBS to assert its preemptive capabilities in the area of standard setting as a means for imposing a basic building code which states and localities could build upon if they wished. This could prove a costly proposition whether or not subnational officials opted to participate in such a program. The same would hold for a strategy in which state and local participation in a nationwide building code system was legally prescribed. In short, while technical assistance mechanisms can deliver nationalized regulatory policies with relatively minimal economic and fiscal implications for state and local governments, creating the right conditions for such assistance could prove very costly.

Except in situations where existing state or local policies already meet national requirements, the use of the other three intergovernmental mechanisms is likely to increase the costs of government operations. Where their respective impacts will differ is in the distribution of those costs. A delivery strategy relying on legal conscription alone will obviously place the burden almost entirely on subnational units. The distribution of costs under the "assertion of preemptive capabilities" approach will depend on the role state and local units choose to play in the regulatory effort given their options. In either instance there is bound to be considerable pressure to modify the costly implications of

each approach, and it is in this context that we see why financial assistance has proven to be the most commonly utilized mechanism. Faced with demands mandated by a system of legal conscription, state and local officials will lobby long and hard for fiscal assistance to help offset the costs of their participation.¹⁰³ And faced with the state and local reluctance to get involved in regulatory programs where they have an option, federal officials are likely to include substantial financial incentives in national programs.

But financial assistance programs, whether used as the primary mechanism for nationalizing regulatory policies or as a supplement to other approaches, have their own limitations and drawbacks. For one thing, as the "balanced budget" and "Proposition 13" mentality spreads from lower level jurisdictions to Washington, the funding available for financial assistance of any kind may become more problematic. Under such conditions, national officials charged with carrying out regulatory mandates might feel compelled to rely more heavily and directly on legal conscription or any of the other mechanisms at their disposal. The fiscal burdens may therefore end up at the subnational level regardless of the current high reliance on financial assistance.

Assuming the federal government's financial capabilities are not reduced in the future, there remain several drawbacks that can have significant implications for the fiscal condition of recipient units. These drawbacks emerge from the ever expanding number and scope of fiscal assistance programs, and not just those associated with nationalized regulatory actions. The lure of federal grants is substantial for they enhance state and local capacities to provide more services and undertake new activities in areas which would go unserved without the availability of outside funding. The attractiveness of community development block grants and categorical assistance for water quality control, mass transit, law enforcement, flood control and similar programs cannot be overstated. Nor can we stress too much the political and economic pressures on eligible subnational units to take advantage of these opportunities. The "carrots" are much too inviting, and besides there is the feeling that "If we don't take it [federal grants], someone else will."¹⁰⁴

Problems arise, however, due to the distorting effects these grants produce in state and local activities. Levine and Posner have noted at least six such distortions: (1) the erosion of budgetary flexibility in subnational units; (2) the distortion of overall budgetary and program priorities within recipient entities; (3) the tendency to "protect" federally funded programs first; (4) increasing intraorganizational, interagency, and intergovernmental conflicts over policy and program priorities; (5) increasing deference to the federal determination of local problems; and (6) reductions in local planning and coordination.¹⁰⁵

The adverse implications of these developments are not merely predictions, for they are having considerable influence right now. The distorting effects of financial assistance mechanisms were brought home to New York City officials in their effort to cut back expenditures during their recent fiscal crisis. They found so much of their spending tied to federal aid "matching fund" programs that they were forced to focus their reductions in police, fire, sanitation, and other basic "housekeeping" functions where federal grants did not mandate cut backs. In the meantime, "special" programs that were linked to federal funding tended to survive.¹⁰⁶

A less dramatic and perhaps more common example is the experience of Lompoc, California. There a federal grant for the development of flood water control will prevent the accumulation and storage of much needed water resources for this community during its long dry season.¹⁰⁷ Clearly, the possibility of a large federal grant was too inviting a "carrot" for the local city council and manager to ignore, and as the number of such opportunities increase some very mundane yet

critical choices will be made regarding local government priorities. Ultimately these choices will be reflected in fiscal patterns that might prove as significant for Lompoc and similar jurisdictions as New York's past decisions did for it.

Of course, the actual fiscal implications of relying primarily on financial assistance or any other delivery mechanism could prove quite positive. And even where adverse impacts arise, these must be weighed against the productive and beneficial side of each effort.

Political Implications. At first glance the nationalization of regulatory policies through intergovernmental mechanisms would seem to have rather obvious political implications, i.e. an increase in the relative power of national over subnational units. Nationalization necessarily implies state and local deference to Washington, and it would logically follow that national officials have the potential leverage to work their will upon lower level jurisdictions through the manipulation of technical, financial, or legal resources. This has led one local official to describe himself and others in his situation as the intergovernmental systems' "grunts." A "grunt" is defined as a low-skilled, poorly qualified worker requiring "the most supervision. In short, you have to keep the grunt on a short string." He goes on to describe the grunts' perspective as analogous to that of "a drunks' view of a Salvation Army Soup kitchen--we'll take their religion as long as we can get our bellies warmed."¹⁰⁸ In such a subordinated and subservient position, the local official appears relatively powerless, a "victim" of centralized power who must defer to survive. The label best summarizing this situation is Michael Reagan's "permissive federalism," i.e. an intergovernmental relationship in which subnational units function in areas and ways that national officials permit them to function.¹⁰⁹

A contrasting image can also be discussed, one which focuses on the considerable political leverage state and local officials gain from involvement in a variety of national regulatory efforts.¹¹⁰ The various intergovernmental arrangements developed for carrying out federally sanctioned or promoted policies have one thing in common: they generally make subnational officials part of a national program. Within specific programs where state or local officials are provided some discretion concerning the content or administration of a national policy, the power of lower level jurisdictions is greatly enhanced. This is the case in pesticide regulation which is coordinated by EPA but implemented in many major farm states by agencies (e.g. departments of agriculture) which are likely to prove far less stringent in both their standards and enforcement.¹¹¹

State and local officials can also obtain considerable political leverage over some national programs due to the roles they play in other intergovernmental capacities. Thus governors who wish to influence national energy policies in their states can mobilize the resources put at their disposal by Congress (and EPA) through environmental legislation and vice versa. Or a city manager can significantly delay or adjust federal highway construction plans by activating provisions of environmental acts or the historical preservation requirements mandated in many grant programs. Here the image is not that of "grunts," but of "Machiavellians" capable of using resources at their disposal to manipulate the system to desired ends. The significant point is that many of those resources are derived from the leverage state and local officials obtain from being part of the intergovernmental arrangements used to deliver nationalized regulatory policy actions.

Therefore it would be difficult to draw any straightforward conclusions regarding the political implications of our four delivery mechanisms. A great deal depends on whether the subnational official involved takes on the qualities of a grunt or a Machiavellian. Some generalizations can be asserted, however.

For example, those mechanisms characterized by high volition (i.e. technical assistance and the assertion of preemptive capabilities) provide greater "leverage" and opportunities for Machiavellian behavior than those marked by lower volition. Among financial assistance mechanisms, block grants and general revenue sharing programs will facilitate more "leverage" for recipient units than categorical grants. And while it might prove more difficult to gain leverage in a situation where legal conscription is the principal vehicle for delivering nationalized regulatory policies, the payoffs (in terms of increased political power) are likely to prove extremely valuable for subnational officials who learn how to utilize their positions in the nationalized regulatory policy system.

In short, as with fiscal implications, it is difficult to predict the political impact of using any of these four intergovernmental delivery mechanisms. The only thing that can be said with certainty is that there will be some political effects. What they will be, however, remains an empirical question.¹¹²

Legal/constitutional implications. If there is one area where the potential impact of these alternative delivery mechanisms seems reasonably clear, it is the area of legal and constitutional implications. Here we focus on two issues: first, the question of any government's legal right to regulate in given areas; and second, the question of federalism and intergovernmental relationships. On the first point, there can be little doubt of government's legal standing to pursue regulatory programs in the areas of "new" or "social" policies (e.g. occupational safety and health, environmental quality, energy usage, etc.). Many of these have not traditionally been associated with national policy actions, but a perusal of early urban and state records indicates that government actions in these areas are historical facts. Generally falling under the rubric of "police powers," government activities in these arenas have only recently been taken up in Washington. Nevertheless, they have been and remain legally relevant matters for governments to deal with.

Somewhat more controversial is the second issue of jurisdictional responsibilities and the condition of American federalism. In a formal and theoretical sense, federalism and intergovernmental relations are separable concepts. One might regard all federal relations as being intergovernmental, but not all intergovernmental relations being federal. Taking the formal definition, federalism is a nonhierarchical, non-centralized pattern of interactions among member units in an organization. Ideally it is a system which operates on a principle of conflict among member units which can only be resolved through negotiations and the development of an acceptable consensus to which disagreeing units can consent. This "conflict-consent" model is in contrast to a unitary system in which a single dominant unit renders a decision which is imposed on subordinated units. These subordinates should defer to the leading entity and cooperate in carrying out its mandates. Reluctance to cooperate is rewarded with coercive sanctions. This is called a "cooperative-coercive" model.¹¹³

Of the four intergovernmental mechanisms examined here, only technical assistance seems to avoid a tendency toward unitary organization. The "federal bias" is a strong ingredient in the decision to rely totally or primarily on technical aid. The idea that national officials might be entrusted to activate this approach is evident in the case of NBS-NCSBCS. Even more significant is NBS's use of this mechanism in the area of weights and measures since it is obvious from a reading of the Constitution that Congress can easily and quite legally assert its preemptory capabilities in that area. In areas of less explicit constitutional delegations this approach would seem even more inviting if the "right conditions" were in place.

In certain cases, financial assistance also complements the federal bias. The greater the degree of volition and policy discretion permitted grant recip-

ients, the more relevant the conflict-consent model becomes. But in delivering nationalized regulatory mandates, financial assistance mechanisms are unlikely to be very "loose" along either dimension. The 55 mph maximum highway speed requirement may not be typical, but it reflects the overall direction and form of grant programs as a means for producing changes in state and local regulatory policies. The cooperation-coercion image is obviously more relevant in such cases.

When national officials choose to formally assert their preemptive capabilities in an issue area, they are likely to be moving in the direction of unitary arrangements while maintaining some semblance of federalism. The latter emerges in the options which national officials allow subnational governments, but even here the federal bias is extremely limited. In OSHA, for example, states have the option to either take part in a unitary national regulatory system or retain their "independence" by avoiding any activities in those matters that OSHA chooses to address.

But it is in legal conscription mechanisms that the movement away from traditional federalism is both most blatant and extreme. By being able to use its legal capacities to literally "force" subnational units to act on behalf of national policies, Washington takes on the role of a hierarchical superordinate who can use coercive sanctions to compel cooperation from state and local units.

Legally and constitutionally this can only be described as a revolutionary change in formal American government institutions. It is a change that has been obscured by both our tendency to use the terms "federalism" and "inter-governmental relationships" interchangeably, and the propensity for policymakers and implementors to rely directly and primarily on financial assistance. Legal conscription, like the abstract set of relations we call "federalism," is inter-governmental, but of an entirely different breed. As we witness a movement toward it and the assertion of preemptive capabilities (as well as a simultaneous movement away from financial and technical assistance), we are witnessing one more step in the ongoing demise of traditional federal relationships. Some might welcome this, others not. The point is, however, that the choices made among the available intergovernmental delivery mechanisms have more than immediate, short-term consequences. The implications can prove much more radical and enduring in constitutional as well as fiscal and political terms.

¹Theodore J. Lowi, "Europeanization of America? From United States to United State," in Nationalizing Government: Public Policies in America, edited by Theodore J. Lowi and Alan Stone (Beverly Hills: Sage Publications, 1978), p. 17.

²Ibid., p. 18.

³William Lilley III and James C. Miller III, "The new 'social regulation'," The Public Interest, no. 47 (Spring, 1977), p. 50 (Table 1).

⁴Cited in "Interventionist Government Came to Stay," Business Week, September 3, 1979, p. 39. Even during two earlier periods known for government activism, there were fewer new regulatory bodies created: eleven during the New Deal decade of the 1930s, and six during the Kennedy-Johnson decade of the 1960s.

⁵Lowi, "Europeanization of America?" p. 19.

⁶Lilley and Miller, 1977, p. 50 (Table 1).

⁷Ibid., p. 53.

⁸Paul H. Weaver, "Regulation, Social Policy, and Class Conflict," in Regulating Business: The Search for an Optimum, edited by Chris Argyris, et al. (San Francisco: Institute for Contemporary Studies, 1978), pp. 209-213. A related difference is found in the functional shift in regulatory policies from those tending to facilitate economic activity to those which seek to exercise control over given populations. For example, see Melvin J. Dubnick and Lafayette Walker, "Problems in U.S. Standard-Setting: The Implications of the Shift to Control Functions," Midwest Review of Public Administration, 13, no. 1 (March, 1979), pp. 25-49.

⁹Murray L. Weidenbaum and Robert DeFina, The Cost of Government Regulation of Economic Activity, Reprint No. 88 (Washington, D.C.: American Enterprise Institute, 1978).

¹⁰These and other studies are summarized in Lee Dymond, Donald Zimmerman and Terrance Davey, "Costs and Benefits of Regulation: A Survey of Studies," in Regulatory Reform Seminar: Proceedings and Background Papers (Washington, D.C.: U.S. Department of Commerce, 1978), Appendix A.

¹¹See Seymour Martin Lipset and William Schneider, "The Public View of Regulation," Public Opinion, 2, no. 1 (January/February, 1979), pp. 6-13.

¹²For an in-depth discussion on the nature of federalism and how it has been changed, see Daniel J. Elazar, "Cursed By Bigness Or Toward A Post-Technocratic Federalism," Publius, 3, no. 2 (Fall, 1973), pp. 239-298.

¹³Theodore J. Lowi, American Government: Incomplete Conquest (Hinsdale, Il.: The Dryden Press, 1976), p. 135.

¹⁴See Lowi, "Europeanization of America?" pp. 5-29; Theodore J. Lowi, The End Of Liberalism: The Second Republic Of The United States, 2nd edition (New York: W. W. Norton and Co., 1979), pp. 273-279. Also James E. Anderson, "Economic Regulatory And Consumer Protection Policies," in Nationalizing Government, edited by Lowi and Stone, especially his discussion of the increase in consumer protection policies which were previously within state jurisdictions (see Table 3.2, p. 69).

¹⁵Rexmond C. Cochrane, Measures For Progress: A History of the National Bureau of Standards (Washington, D.C.: U.S. Department of Commerce, 1966), chapter 1; also Carl Bridenbaugh, Cities in the Wilderness: The First Century of Urban Life in America (New York: Alfred A. Knopf, 1955).

¹⁶One finds this assumption, for example, in a variety of "developmental" theories of economic growth (e.g. those associated with Adolph Wagner, Peacock and Wiseman, and W. W. Rostow); see Bernard P. Herber, Modern Public Finance: The Study of Public Sector Economics, 3rd edition (Homewood, Il.: Richard D. Irwin, Inc., 1975), pp. 366-375. Discussions of the centralizing pull of technological developments also tend to assume the correlation of authority and implementation; see Samuel H. Beer, "The Modernization of American Federalism," Publius, 3, no. 2 (Fall, 1973), pp. 74-80. The "traditional paradigm" of public administration also includes a normative bias along these lines; see Vincent Ostrom.

¹⁷This "policy action" perspective is different from those relying on "institutional" or "functional" views of regulation; see Mel Dubnick, "Making Regulators Regulate," paper presented at 1979 National Conference on Public Administration, Baltimore, Maryland.

¹⁸Governments often authorize private entities to regulate themselves or others under a contractual arrangement (i.e. self-regulation), but for present purposes we will limit our analysis to regulations carried out by government agencies.

¹⁹This approach to social welfare reform was initially presented in a June, 1966 report issued by HEW's Advisory Council On Public Welfare ("A Nationwide Comprehensive Program Based Upon A Single Criterion: Need"); see Daniel P. Moynihan, "The Crises in Welfare," in Coping: Essays on the Practice of Government (New York: Random House, 1973), for more background.

²⁰For an in-depth discussion of interstate and regional organizations, see Martha Derthick with Gary Bombardier, Between State and Nation: Regional Organizations of the United States (Washington, D.C.: The Brookings Institution, 1974), especially chapter 1.

²¹This is the rationale behind several major interstate authorities: the Tennessee Valley Authority, the Delaware River Basin Commission, and the Appalachian Regional Commission.

²²"Coordination" functions are the primary reasons underlying the creation of several interstate organizations developed under Title V of the 1965 Public Works and Economic Development Act: Coastal Plains, Four Corners, Ozarks, and Upper Great Lakes commissions.

²³E.g. Title V commissions and various entities created under Title II of the 1965 Water Resources Planning Act; see Derthick with Bombardier, 1974, p. 7.

²⁴Frank P. Grad, "Intergovernmental Aspects of Environmental Controls," in Managing The Environment (Washington, D.C.: U.S. Environmental Protection Agency, November, 1973), pp. 323-349.

²⁵See conclusions reached in Derthick with Bombardier, 1974, chapter 11.

²⁶See Harrop A. Freeman, "Dynamic Federalism and the Concept Of Preemption," DePaul Law Review, 21 (1972), pp. 630-648.

²⁷Samuel Krislov, "The Supreme Court In The Political Process," in Cooperation and Conflict: Readings In American Federalism, edited by Daniel J. Elazar, et al. (Itasca, Il.: F.E. Peacock Publishers, Inc., 1969), p. 157. The national government's ability to mobilize preemptive mechanisms is found primarily in specific passages of the Constitution; for a brief overview, see James B. Croy, "Federal Supersession: The Road to Domination," State Government, XLVIII, no. 1 (Winter, 1975), pp. 32-36. But preemption has also emerged through court decisions not directly linked to those passages, e.g. whenever significant conflicts arose between national policies and state actions; see Freeman, 1972.

²⁸See C. Herman Pritchett, The American Constitution, 2nd edition (New York: McGraw-Hill Book Co., 1968), chapter 14.

²⁹Croy, 1975, p. 33.

³⁰For example, the 1964 Civil Rights Act contains clearly preemptory declarations on state and local activity in the area of civil rights while simultaneously mandating state and local efforts to carry out national policy wishes in these areas. Thus, the Act outlaws any discriminatory policy actions required by state law or "carried on 'under color of the law' or 'any custom or usage required or enforced by officials of the state.'" See Pritchett, 1968, pp. 729 and 736. This is not atypical of the approach taken by national policy-makers in many regulatory areas, i.e. preemptive terminology is used actually intended.

³¹Lettie McSpadden Wenner, One Environment Under Law: A Public Policy Dilemma (Pacific Palisades, Ca.: Goodyear Publishing Co., Inc., 1976), p. 90.

³²See James E. Krier and Edmund Ursin, Pollution and Policy: A Case Essay on California and Federal Experience with Motor Vehicle Air Pollution, 1940-1975 (Berkeley, Ca.: University of California Press, 1977).

³³C. K. Rowland and Roger M. Marz, "Interstate Inequities in the Implementation of Toxic Substance Regulations: The Case of Pesticides," paper presented at December, 1979 Symposium on Regulatory Reform, Chicago, Illinois.

³⁴Such proposals have been primarily academic; e.g. Roscoe C. Martin, The Cities and the Federal System (New York: Atherton Press, 1965).

³⁵See Elinor Ostrom, "Metropolitan Reform: Propositions Derived From Two Traditions," Social Science Quarterly, 53 (December, 1972), pp. 474-493.

³⁶See Anwar H. Syed, The Political Theory of American Local Government (New York: Random House, 1966).

³⁷E.g. Ronald D. Brunner, "Decentralized Energy Policies," Public Policy, 28, no. 1 (Winter, 1980), pp. 71-91.

³⁸E.E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America (New York: Holt, Rinehart and Winston, 1960); also see Roger W. Cobb and Charles D. Elder, Participation in American Politics: The Dynamics of Agenda-Building (Baltimore: The Johns Hopkins University Press, 1972) and Robert Eyestone, From Social Issues To Public Policy (New York: John Wiley and Sons, 1978).

³⁹See Mark V. Nadel, The Politics of Consumer Protection (Indianapolis: Bobbs-Merrill, 1971); also Paul Sabatier, "Social Movements and Regulatory Agencies: Toward a More Adequate--and Less Pessimistic--Theory of 'Clientele Capture,'" Policy Sciences, 6, no. 3 (September, 1975), pp. 301-342; and Jeffrey M. Berry, Lobbying For The People: The Political Behavior of Public Interest Groups (Princeton, N.J.: Princeton University Press, 1977).

⁴⁰Elazar, 1973; also Parris N. Glendening and Mavis Mann Reeves, Pragmatic Federalism: An Intergovernmental View of American Government (Pacific Palisades, Ca.: Palisades Publishers, 1977).

⁴¹For a potentially useful typology of middle-range approaches, see David L. Weimer, "Federal Intervention In The Process of Innovation In Local Agencies: A Focus on Organizational Incentives," Public Policy, 28, no. 1 (Winter, 1980), pp. 93-116.

⁴²This Office of Management and Budget Policy Study Committee definition is cited in State and Local Governments' Views on Technical Assistance, A Staff Study, issued by the General Accounting Office on July 12, 1978 (pp. 1-2).

⁴³See Paul J. Flynn, James D. Carroll and Thomas A. Dorsey, "Vertical Coalitions for Technology Transfer: Toward an Understanding of Intergovernmental Technology," Publius, 9, no. 3 (Summer, 1979), pp. 3-33.

⁴⁴General Accounting Office, State and Local Governments' Views on Technical Assistance, pp. 2-3.

⁴⁵Cochrane, 1966, Chapter 1.

⁴⁶Scandals have long plagued this field, and it is usually regarded as a prime example of "capture" and "producer protection" regulation wherein some special interests (in this case, plumbers, carpenters, and other members of the building trades) are served rather than the "public health, safety, or welfare."

⁴⁷Cited in CFR 200.100(a)(4).

⁴⁸CFR 200.104(a).

⁴⁹These issues were raised in a number of reports during the early 1960s, but of particular importance was one published in 1966 by the Advisory Commission on Intergovernmental Relations.

⁵⁰Among other accomplishments it has issued model state legislation and regulations on such matters as mobile homes, manufactured buildings, statewide building codes, and the registration of enforcement officials. It developed a system for accrediting evaluation testing laboratories, and established formal and informal operational linkages between itself and other relevant private and public organization (e.g. the American Society for Testing and Materials, the National Institute of Building Sciences, the Building Seismic Safety Council).

⁵¹The separation was more physical than actual. NCSBCS was housed within NBS facilities at Gaithersburg, Maryland until the 1975 incorporation when it moved to Langley, Virginia.

⁵²The relationship was further enhanced by the activities and career of NCSBCS's first chairperson, Gene A. Rowland, who later became chief of NBS's Building Research Division and director of its Office of Engineering Standards. In short, there exist strong personal ties which have added to NCSBCS's success as an NBS strategy. For a brief overview of NBS-NCSBCS relationships, see Gene A. Rowland, "A Perspective on NBS and NCSBCS Research and Assistance to the Building Community," in Research and Innovation in the Building Regulatory Process, NBS Special Publication 552 (Gaithersburg, Md.: U.S. Department of Commerce, National Bureau of Standards, July, 1979), pp. 5-12. The authors would like to thank Lafayette Walker of NBS for his help in this research.

⁵³See Deil S. Wright, Understanding Intergovernmental Relations: Public Policy and Participants' Perspectives in Local, State, and National Governments (North Scituate, Mass.: Duxbury Press, 1978), pp. 8-14.

⁵⁴Catherine Lovell, "The Mandate Issue," in Federal and State Mandating on Local Governments: An Exploration of Issues and Impacts, edited by Catherine Lovell, et al. (Riverside, Ca.: Graduate School of Administration, University of California, June, 1979), p. 32. The definition used by Lovell is modified here to exclude non-aid mandates.

⁵⁵Ibid., pp. 35-36.

⁵⁶U.S. Office of Management and Budget, Managing Federal Assistance in the 1980s: Working Papers (Washington, D.C.: OMB, August/September, 1979), especially A1-A8; hereafter cited as Managing Federal Assistance.

⁵⁷PL 92-583; and PL 94-370.

⁵⁸Cited in CFR 920.1.

⁵⁹CFR 920.10-920.19.

⁶⁰See especially CFR 920.14(b)(2)(1).

⁶¹Walter A. Rosenbaum, The Politics of Environmental Concern, 2nd edition (New York: Praeger Publishers, 1977), p. 219.

⁶²See Wayne Penn and C. Gregory Buntz, "State Responses To Federal Health Regulatory Requirements," Journal of Health and Human Resources Administration, 2, no. 3 (February, 1980), pp. 282-298.

⁶³PL 93-641.

⁶⁴Managing Federal Assistance, p. A-7-7.

⁶⁵Ibid., p. A-7-9.

⁶⁶Ibid., pp. A-7-9,10.

⁶⁷Ibid., pp. A-7-10,11.

⁶⁸Ibid., p. A-7-12.

⁶⁹The one major possible exception to this was the 1974 amendment to the Fair Labor Standards Act which extended federal minimum wage and maximum hour standards to all state and local employees, but even this is a poor example of horizontal program quality mandates on two grounds: first, although withholding or rescinding federal aid might have been useful as a tool in enforcing these standards, the law itself was a more direct assertion of federal power and could have been implemented through litigation alone; and second, the amendment was declared unconstitutional in a 1976 decision, National League of Cities v. Usery, 426 U.S. 833.

⁷⁰Managing Federal Assistance, p. A8.6.

⁷¹See ibid., paper A8; also Advisory Commission on Intergovernmental Relations, Categorical Grants: Their Role and Design, Report A-52 (Washington, D.C.: A.C.I.R., 1978).

⁷²Administrative purposes are those we've discussed above as organizational/procedural and include such requirements as having a single agency dealing with a program area (e.g. highways) or requiring that the state supply the granting agency with certain types of program feedback. Political goals are served by using grants in a presidential or other election campaign to draw attention to the incumbent's activities.

⁷³Often under pressures generated by state and local officials themselves. See Donald H. Haider, When Governments Come To Washington: Governors, Mayors, and Intergovernmental Lobbying (New York: The Free Press, 1974); also Samuel H. Beer, "The Adoption Of General Revenue Sharing: A Case Study in Public Sector Politics," Public Policy, 24, no. 2 (Spring, 1976), pp. 127-195.

⁷⁴Charles H. Levine and Paul L. Posner, "The Centralizing Effects of Austerity on the Intergovernmental System," revision of paper presented at 1979 American Political Science Association meeting, Washington, D.C. Also see the exchange between a resident of a small California city and the city's mayor: Bess Christensen, "Playing the grants game in Lompoc," Business Week, June 2, 1980, pp. 12, 15; and letter from E.C. Stevens, "The other side of the coin," Business Week, July 7, 1980, p. 4.

⁷⁵See David E. Engdahl, "Preemptive Capability of Federal Power," University of Colorado Law Review, 45 (1973), pp. 51-88.

⁷⁶W. Joseph Heffernan, Introduction to Social Welfare Policy: Power, Scarcity and Common Human Needs (Itasca, IL: F.E. Peacock Publishers, 1979), pp. 134-137.

⁷⁷PL 91-596.

⁷⁸PL 91-596, Section 2(b).

⁷⁹Richard Zeckhauser and Albert Nichols, "The Occupational Safety and Health Administration--An Overview," in Study on Federal Regulation, Volume VI: Framework for Regulation, Appendix (Washington, D.C.: Committee on Governmental Affairs, U.S. Senate, 1978), p. 209.

⁸⁰Heffernan, 1979, p. 135.

⁸¹The Surface Mining Control and Reclamation Act of 1977 (PL 95-87) has the federal government establishing and enforcing strip mining and reclamation standards which can be turned over (in 1981) to those states which demonstrate the ability and willingness to adopt and implement standards at least as stringent.

⁸²There are certain instances where the preemptory assertion of federal law is vague enough to allow for court interpretations regarding the states' right to adopt and enforce standards and regulations at least as strict as those set forth by Washington. One such instance is described in Lee S. Weinberg, "Askew v. American Waterways Operators, Inc.: The Emerging New Federalism," Publius, 8, no. 4 (Fall, 1978), pp. 37-53.

⁸³PL 91-604, Section 101(a)(3)

⁸⁴PL 91-604, Section 101(a)(4)

⁸⁵PL 91-604, Section 107(a)

⁸⁶PL 91-604, Section 108

⁸⁷PL 91-604, Sections 109-110

⁸⁸PL 91-604, Section 110(c)(1)

⁸⁹PL 91-604, Section 111(a)(2)

⁹⁰PL 91-604, Section 113(a)(2)

⁹¹PL 91-604, Section 209

⁹²PL 91-604, Section 233

⁹³PL 91-604, Section 112(d)(1)

⁹⁴PL 91-604, Section 114(b)(1)

⁹⁵PL 91-604, Section 105

⁹⁶The Energy Supply and Environmental Coordination Act of 1974 (PL 93-319) and the Clean Air Act Amendments of 1977 (PL 95-95).

⁹⁷PL 92-500

⁹⁸PL 95-619

⁹⁹PL 95-619, Section 219

¹⁰⁰A number of studies focused on the development and implementation of recent regulatory policies gives credence to this contention. See Charles O. Jones, Clean Air: The Policies and Politics of Pollution Control (Pittsburgh: University of Pittsburgh Press, 1975). Also three articles in Public Policy Making In A Federal System, edited by Charles O. Jones and Robert D. Thomas (Beverly Hills: Sage Publications, 1976); Robert D. Thomas, "Intergovernmental Coordination in the Implementation of National Air and Water Pollution Policies," pp. 129-148; Sheldon Edner, "Intergovernmental Policy Development: The Importance of Problem Definition," pp. 149-167; and Bruce P. Ball, "Water Pollution And Compliance Decision Making," pp. 169-187.

¹⁰¹These distinctions were first developed by Theodore J. Lowi in "American Business, Public Policy, Case Studies, and Political Theory," World Politics, 16 (July, 1964), pp. 677-715. The distributive nature of the current political system in the U.S. has been a theme in the work of Lowi and others.

¹⁰²See Mel Dubnick and Alan Gitelson, "Intergovernmental Relations And Regulatory Policy," paper presented at Symposium on Regulatory Policy, November, 1979, Houston, Texas.

¹⁰³One can read Justice Rehnquist's opinion in National League of Cities v. Usery to mandate such assistance; see discussion in Laurence H. Tribe, "Unraveling National League of Cities: The New Federalism And Affirmative Rights To Essential Government Services," Harvard Law Review, 90, no. 6 (April, 1977), p. 1091.

¹⁰⁴Christensen, Business Week, June 2, 1980.

¹⁰⁵See Levine and Posner, 1979.

¹⁰⁶Temporary Commission on City Finances, cited in ibid..

¹⁰⁷Christensen, Business Week, June 2, 1980.

¹⁰⁸John V. Weatherspoon, "Life Among the 'Grunts'," The Urban Interest, 2, no. 1 (Spring, 1980), pp. 52-58.

¹⁰⁹Michael D. Reagan, The New Federalism (New York: Oxford University Press, 1972), p. 10.

¹¹⁰See Dubnick and Gitelson, 1979.

¹¹¹Rowland and Marz, 1979.

¹¹²The authors would like to thank Eric Anderson, city manager of Munster, Indiana, for his help in clarifying the political leverage issue.

¹¹³See Aaron Wildavsky's discussion of federalism in "A Bias Toward Federalism," in Speaking Truth To Power: The Art and Craft of Policy Analysis (Boston: Little, Brown and Co., 1979), Chapter 6.

